

# Rutgers Journal of Law & Public Policy

VOLUME 4

FALL 2007

ISSUE 4

**Editor-in-Chief**

BRETT E. TANZMAN

**Executive Editor**

DANIEL H. MANDEL

**Managing Articles  
Editor**

MANDY KNOX

**Senior Articles  
Editor**

JENNIFER PURNELL

**Articles Editors**

MARISSA BAND  
JENNIFER CARLSON  
JEN EVERTS  
BRIAN UZDAVINIS

**Marketing  
Editors**

LLOYD FREEMAN  
KAUSHIK RATH

CHANTAL ARTUR  
MICHAEL BARNES  
KEVIN BIRKHEAD  
SUPURNA BHAR  
LAUREL BUDMAN  
KRISTYN BYRNES  
TARA CANNADAY  
ASHLEY D'AMATO  
BRENDAN FERNALD  
BRIAN HILDEBRANDT  
JULIE HOROWITZ

**Managing Technology  
Editor**

JENNIFER COLANGELO

**Managing Research  
Editor**

CHRISSEY CATALFAMO

**Lead Technology Editor**

JERRY LEVINE



**Business Development  
Editor**

JOSH NUSSBAUM

**Members**

ANDY HUGHES  
ALEXANDRIA JEAN-PIERRE  
TIFFANY JOHNSON  
ADAM MARC KAPLAN  
AMY KESEDAY  
ESTHER KIM  
CHRISTINA KUBIAK  
ERIC LEVINE  
DARREL MARTINELLI  
JESSE MELENDREZ  
RACHAEL MINARDI

**Faculty Advisors**

PHILIP L. HARVEY  
SARAH E. RICKS  
DAMON Y. SMITH

**Managing Notes  
Editor**

CATHLYN SULLIVAN

**Senior Notes  
Editor**

SUMMER DAVIS

**Notes Editors**

LAUREN BRANTZ  
RYAN FRAMPTON  
ORLY JASHINSKY  
CHAIM KURLAND  
JENNIFER LUYBER  
ESTHER OMOLOYIN  
KRISTIN CASALE

**Submissions  
Editor**

PETE GIRGIS

LOUIS MOYA  
MARIE OLIVER  
BRIAN PREW  
A. MASON ROHRER  
PETER COLONNA ROMANO  
RUCHIKA SACHDEVA  
SUSAN SHAW  
LALENA TURCHI  
ANTHONY VECCHIO  
NEENA VERMA  
CARRIE WINTERS

## About the Rutgers Journal of Law & Public Policy

The *Rutgers Journal of Law and Public Policy* (ISSN 1934-3736) is published three times per year by students of the Rutgers School of Law – Camden, located at 17 North Fifth Street, Camden, NJ 08102. The views expressed in the *Rutgers Journal of Law & Public Policy* are those of the authors and not necessarily of the *Rutgers Journal of Law & Public Policy* or the Rutgers School of Law – Camden.

**Form:** Citations conform to *The Bluebook: A Uniform System of Citation* (18<sup>th</sup> ed. 2005). Please cite the *Rutgers Journal of Law & Public Policy* as 5 RUTGERS J.L. & PUB. POL'Y \_\_ (2007).

**Copyright:** All articles copyright © 2007 by the *Rutgers Journal of Law & Public Policy*, except where otherwise expressly indicated. For all articles to which it holds copyright, the *Rutgers Journal of Law & Public Policy* permits copies to be made for classroom use, provided that (1) the author and the *Rutgers Journal of Law & Public Policy* are identified, (2) the proper notice of copyright is affixed to each copy, (3) each copy is distributed at or below cost, and (4) the *Rutgers Journal of Law & Public Policy* is notified of the use.

For reprint permission for purposes other than classroom use, please submit request as specified at <http://www.rutgerspolicyjournal.org/>.

**Manuscripts:** The *Rutgers Journal of Law & Public Policy* seeks to publish articles making original contributions in the field of public policy. The *Journal* accepts both articles and compelling essays for publication that are related to the expansive topic of public policy. Manuscripts must contain an abstract describing the article or essay which will be edited and used for publication on the website and in CD-ROM format. The *Journal* welcomes submissions from legal scholars, academics, policy makers, practitioners, lawyers, judges and social scientists.

Electronic submissions are encouraged. Submissions by email and attachment should be directed to [submissions@rutgerspolicyjournal.org](mailto:submissions@rutgerspolicyjournal.org).

Paper or disk submissions should be directed to *Rutgers Journal of Law & Public Policy*, Rutgers University School of Law – Camden, 217 North 5th Street, Camden, New Jersey 08102.

**Subscriptions:** Subscription requests should be mailed to to *Rutgers Journal of Law & Public Policy*, Rutgers University School of Law – Camden, 217 North 5th Street, Camden, New Jersey 08102, or emailed to [info@rutgerspolicyjournal.org](mailto:info@rutgerspolicyjournal.org).

**Internet Address:** The *Rutgers Journal of Law & Public Policy* website is located at <http://www.rutgerspolicyjournal.org>.

## OFFICERS OF THE UNIVERSITY

RICHARD L. MCCORMICK, B.A., Ph.D., *President*  
MARGARET S. MARSH, B.A., M.A., Ph.D., *Interim Provost and Dean, FASC*

## LAW SCHOOL ADMINISTRATION

RAYMAN L. SOLOMON, B.A., M.A., J.D., Ph.D., *Dean and Professor of Law*  
JAYDEV CHOLERA, B.A., M.B.A., *Director, Finance and Administration*  
JOHN S. BECKERMAN, A.B., M.A., J.D., Ph.D., *Associate Dean—Academic Affairs*  
CAMILLE SPINELLO ANDREWS, B.A., J.D., *Associate Dean—Enrollment*  
ANNE V. DALESANDRO, A.B., M.L.S., J.D., *Director of Law Library*  
BARBARA MAYLATH, A.B., *Director of Development*  
EVE BISKIND KLOTHEN, B.G.S., J.D., *Assistant Dean for Pro Bono and Public Interest Programs*  
ANGELA V. BAKER, B.A., J.D., *Associate Dean of Students and Career Planning*

## FACULTY

AARON ARI AFILALO, A.B., J.D., LL.M.,  
*Associate Professor of Law*  
DAVID E. BATISTA, A.B., J.D., M.S., *Librarian*  
LINDA S. BOSNIAK, A.B., J.D., M.A., *Professor of Law*  
HON. DENNIS BRAITHWAITE, B.S., J.D., LL.M.,  
*Visiting Professor of Law*  
A. HAYS BUTLER, B.A., J.D., M.S. (LIS),  
*Librarian II*  
LISA CAPASSO, *Visiting Clinic Asst. Prof. - LRW*  
MICHAEL A. CARRIER, B.A., J.D., *Associate Professor of Law*  
FRED C. CHANDLER, Jr., B.A., LL.B., LL.M.,  
*Professor of Law Emeritus*  
GLORIA F. CHAO, B.A., M.L.S., *Librarian II*  
EDWARD E. CHASE, B.A., J.D., *Professor of Law Emeritus*  
VICTORIA L. CHASE, B.A., J.D., *Clinical Associate Professor of Law*  
ROGER S. CLARK, B.A., LL.B., LL.M., J.S.D., LL.D., *Board of Governors Professor*  
JASON K. COHEN, B.A., J.D., *Legal Writing Clinical Asst. Professor*  
RUSSELL M. COOMBS, B.A., J.D., *Associate Professor of Law*  
LUCY COX, B.A., M.S., Ph.D., M.L.S., *Librarian II*  
PERRY DANE, B.A., J.D., *Professor of Law*  
JOHN H. DAVIES, B.S., LL.B., LL.M., *Professor of Law Emeritus*  
JAY M. FEINMAN, B.A., J.D., *Distinguished Professor of Law*  
KIMBERLY D. FERZAN, B.S., J.D., *Professor of Law*  
DAVID M. FRANKFORD, B.A., J.D., *Professor of Law*  
ANN E. FREEDMAN, B.A., J.D., *Associate Professor of Law*  
STEVEN F. FRIEDEL, B.A., J.D., *Professor of Law*  
SANDRA GAVIN, B.A., J.D., *Director of Advocacy Programs*  
ERIC GILSON, B.A., J.D., M.L.I.S., *Librarian III*  
GEORGE GINSBURGS, *Bacchalaureat Serie Mathematiques*, B.A., M.A., Ph.D.,  
HARRIET N. KATZ, B.A., J.D., *Clinical Professor of Law & Director, Lawyering Program*  
A. KODZO PAAKU KLUDZE, B.A., LL.B., Ph.D.,  
*Distinguished Professor of Law Emeritus*  
DONALD KOROBKIN, B.A., A.M., J.D., *Professor of Law*  
ARTHUR B. LABY, B.A., J.D., *Associate Professor of Law*  
F. GREGORY LASTOWKA, B.A., J.D., *Associate Professor of Law*  
ARNO LIIVAK, B.A., M.L.S., J.D., *Professor of Law Emeritus*  
HARRY LITMAN, A.B., J.D., *Visiting Associate Professor of Law*  
MICHAEL A. LIVINGSTON, A.B., J.D., *Professor of Law*  
JOHN C. LORE, III, *Visiting Asst. Clinical Professor of Law*  
JONATHAN MALLAMUD, A.B., J.D., *Professor of Law Emeritus*  
EARL M. MALTZ, B.A., J.D., *Distinguished Professor of Law*  
KIMBERLY MUTCHERSON, B.A., J.D., *Associate Professor of Law*  
JOHN F. K. OBERDIEK, B.A., M.A., J.D., Ph.D.,  
*Associate Professor of Law*  
CRAIG N. OREN, A.B., J.D., *Professor of Law*  
TRACI OVERTON, B.A., J.D., *Clinical Staff Attorney*  
DENNIS M. PATTERSON, B.A., M.A., J.D., Ph.D.,  
*Distinguished Professor of Law*  
IMANI PERRY, B.A., J.D., LL.M., Ph.D.,  
*Professor of Law*  
STANISLAW POMORSKI, LL.B., LL.M., J.S.D.,  
*Distinguished Professor of Law Emeritus*  
SARAH RICKS, B.A., J.D., *Clinical Associate Professor, Legal Writing*  
RUTH ANNE ROBBINS, B.A., J.D., *Clinical Professor of Law & Chair, LRW Program*  
SHEILA RODRIGUEZ, *Clinical Asst. Professor-LRW*  
RAND E. ROSENBLATT, B.A., M.Sc., J.D.,  
*Professor of Law*  
PATRICK J. RYAN, B.A., M.A., J.D., LL.M., J.S.D., *Associate Professor of Law*

*Distinguished Professor of Law Emeritus*  
SALLY F. GOLDFARB, B.A., J.D., *Associate Professor of Law*  
ELLEN P. GOODMAN, A.B., J.D., *Professor of Law*  
JOANNE GOTTESMAN, B.A., J.D., *Clinical Associate Professor of Law*  
PHILLIP L. HARVEY, B.A., J.D., Ph.D., *Professor of Law*  
ELIZABETH L. HILLMAN, B.S.E.E., J.D., Ph.D., *Professor of Law*  
N.E.H. HULL, B.A., Ph.D., J.D., *Distinguished Professor of Law*  
RICHARD HYLAND, A.B., M.F.A., J.D., D.E.A., *Distinguished Professor of Law*  
JOHN P. JOERGENSEN, B.A., M.A., M.S. (LIS), J.D., *Librarian II*  
DONALD K. JOSEPH, B.S., LL.B., *Visiting Associate Professor of Law*

MEREDITH L. SHALICK, B.A., M.S., J.D., *Visiting Clinical Asst. Professor of Law*  
SANDRA SIMKINS, *Clinical Associate Professor of Law*  
RICHARD G. SINGER, B.A., J.D., LL.M., J.S.D., *Distinguished Professor of Law*  
DAMON Y. SMITH, B.A., M.U.P., J.D., *Assistant Professor of Law*  
WILLIAM M. SPEILLER, B.S., LL.B., LL.M., *Professor of Law Emeritus*  
ALLAN R. STEIN, B.A., J.D., *Professor of Law*  
BETH STEPHENS, B.A., J.D., *Professor of Law*  
GERARDO VILDOSTEGUI, B.A., J.D., *Visiting Professor of Law*  
CAROL WALLINGER, B.S., J.D., *Legal Writing, Clinical Associate Professor of Law*  
ROBERT M. WASHBURN, A.B., J.D., LL.M., *Professor of Law*  
ROBERT F. WILLIAMS, B.A., J.D., LL.M., LL.M., *Distinguished Professor of Law*

**Rutgers**  
**Journal of Law & Public Policy**

---

VOLUME 4

FALL 2007

ISSUE 4

---

**Student Notes & Other**  
**Current Issues in**  
**Public Policy**

© 2007 by Rutgers University School of Law – Camden  
ISSN 1934-3736



# Rutgers Journal of Law & Public Policy

---

VOLUME 4

FALL 2007

ISSUE 4

---

## CONTENTS

TO SAVE OR NOT TO SAVE:  
HISTORIC PRESERVATION IN NEW JERSEY -JUSTIFICATIONS,  
HINDRANCES, FUTURE .....649  
*Brian Uzdevinis*

NOTE: FEDERAL TAX CREDIT INCENTIVES AS A METHOD  
OF PROMOTING BROWNFIELD REMEDIATION..... 695  
*Lauren Brantz*

*KELO V. NEW LONDON* AND THE STATE LEGISLATIVE  
REACTION: EVALUATING THE EFFICACY AND NECESSITY  
OF RESTRICTING EMINENT DOMAIN FOR ECONOMIC  
REDEVELOPMENT AT THE STATE LEVEL..... 730  
*Ryan Frampton*

WELFARE FRAUD, NECESSITY, AND MORAL  
JUDGEMENT..... 766  
*Eyal Kimel*

PLACE THE DEATH PENALTY ON A TRIPOD, OR MAKE IT  
STAND ON ITS OWN TWO FEET? .....788  
*Margo A. Rocklin*







## TO SAVE OR NOT TO SAVE: HISTORIC PRESERVATION IN NEW JERSEY – JUSTIFICATIONS, HINDRANCES, FUTURE

Brian Uzdavinis<sup>1</sup>

### I. INTRODUCTION

#### A. DEFINING HISTORIC PRESERVATION

The concept evokes images of wealthy older women sitting well postured on horse-hair-stuffed settees in the parlor of some Victorian mansion, just one among a lengthy strip of painted ladies standing demurely along a shady, tree-lined street. A fire crackles in the background, a Victrola plays, lace lies everywhere. They discuss the horrid color their new neighbors have slapped over the Dutch Colonial just up the way, chiming, “Just wait until the mayor hears.” Outside the front door hangs a plaque asserting that so-and-so lived here during the Civil War. For some this may seem quaint, but it no longer sets the context for more modern approaches to historic preservation.

The gradual legal recognition of aesthetics-based zoning and preservation-focused regulatory efforts as legitimate exercises of state police powers has resulted in a proliferation of statutes and ordinances of the sort from the national to the most local levels

---

<sup>1</sup> The author received his Juris Doctor in May 2007 from Rutgers University School of Law in Camden, New Jersey. He has served as Chairman of the Woodbury Historic Preservation Commission, and is a Trustee of the Woodbury Old City Restoration Committee, a non-profit corporation organized to preserve the historic character and structures of the City of Woodbury, New Jersey.

of governance.<sup>2</sup> To most state and local governing bodies today, historic preservation represents a number of things, a means of conserving natural resources and curbing sprawl, generating heritage tourism, increasing property values, reusing existing resources and revitalizing aging, run-down neighborhoods.<sup>3</sup>

The success of such efforts turns on a number of factors and, typically, these movements to safeguard the past bear consequences that are both planned and, in some instances, entirely unintended. Critics take issue with the accompanying infringements on private property rights<sup>4</sup> and the notion that the stylistic conformity resulting from such regulations tends to stifle creativity of design.<sup>5</sup> From a socio-economic perspective, some studies stress the problem of displacement that results from the related increases to property values and rental prices which, in turn, compel the relocation of the low- to moderate-income families that often inhabit the older communities that typically become targets for the preservationist's rehabilitative impulse.<sup>6</sup>

## B. THE NEW JERSEY CONTEXT

New Jersey exemplifies the basic factors underlying the competing interests involved with historic preservation efforts; the state claims an ever-growing number of residents who

---

<sup>2</sup> See generally Sandra G. McLamb, *Preservation Law Survey 2001: State Preservation Law*, 8 WIDENER L. SYMP. J. 463 (2002).

<sup>3</sup> REBECCA HERSH, NEW JERSEY FUTURE, HISTORIC PRESERVATION, SMART GROWTH RECOMMENDATIONS FROM NEW JERSEY FUTURE, (March 2005), <http://www.njfuture.org/Media///Docs/hist%20pres.pdf>; see also RANDALL MASON, THE BROOKINGS INSTITUTION METROPOLITAN POLICY PROGRAM, THE BROOKINGS INSTITUTION, THE ECONOMICS OF HISTORIC PRESERVATION (2005).

<sup>4</sup> Tyler E. Chapman, Note, *To Save and Save Not: The Historic Preservation Implications of the Property Rights Movement*, 77 B.U.L. REV. 111 (1997).

<sup>5</sup> See *infra* notes 6, 64, 92

<sup>6</sup> Carol M. Rose, *Preservation and Community: New Directions in the Law of Historic Preservation*, 33 STAN. L. REV. 473 (1981); see also Michael Newsom, *Blacks and Historic Preservation*, 36 LAW & CONTEMP. PROBS. 423 (1971).

comprise an increasingly dense population that drives a steady demand for new commercial and residential development, all of which places an incredible strain on the state's historic resources.<sup>7</sup> In fact, New Jersey is the most densely populated state in the country, with its 8.7 million residents inhabiting the 7,417 square miles within the state's borders for an average of more than 1,100 people per square mile.<sup>8</sup> First settled in the 1630's, New Jersey also remains one of the oldest states with many of the nation's earliest properties.<sup>9</sup> Forty-five percent of the state's dwellings were constructed before 1959 and that percentage becomes still higher in older, more concentrated urban areas like Newark, where the figure is closer to 65 percent.<sup>10</sup>

Certainly, the state has sought to capitalize on the potential benefits offered by preservation-oriented laws and regulations. The Borough of Haddonfield in Camden County initiated New Jersey's first program of municipally designated historic properties around 1971.<sup>11</sup> Since then, more than 165 of the state's 566 municipalities have joined the Borough in establishing

---

<sup>7</sup> TIM EVANS, NEW JERSEY FUTURE, RACE TO THE MIDDLE: THE HOMOGENIZATION OF POPULATION DENSITY AND WHAT IT'S COSTING NEW JERSEY, (August 2004), <http://njfuture.org/Media/Docs/race.pdf>.

<sup>8</sup> U.S. CENSUS BUREAU, STATE AND COUNTY QUICK FACTS, NEW JERSEY, <http://quickfacts.census.gov/qfd/states/34000.html>. New Jersey's estimated population of 8.7 million is a projection for the year 2004 based on figures produced by the 2000 Census. The 2004 projection reflects a 3.4 percent increase from the state's population of 8.4 million in 2000, which itself shows an 8.6 percent increase from the state's 1990 population. New Jersey's average population density of 1,134 people is more than 14 times the national average of 80 people per square mile. The median value of the state's owner-occupied housing units in 2000 was \$170,800, about 30 percent higher than the national average of \$119,600. New Jersey's average per capita income of \$27,000, based on 1999 tabulations, was more than 20 percent higher than the national average of \$21,590. Meanwhile, 8.5 percent of the state's population fell below the poverty line.

<sup>9</sup> Hersh, *supra* note 3.

<sup>10</sup> *Id.*

<sup>11</sup> CHARLES SCOTT, STATE OF NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, NATURAL AND HISTORIC RESOURCES, HISTORIC PRESERVATION (1996), <http://www.state.nj.us/dep/hpo/4sustain/hparticle.pdf>

historic preservation commissions – on a national basis, that figure stretches into the thousands.<sup>12</sup> The most recent figures tracked by the New Jersey State Historic Preservation Office's inventory database show a total of 607 historic districts and 3,553 individual sites across the state.<sup>13</sup>

Nevertheless, preservation advocates in New Jersey encounter numerous hurdles from the outset, from funding shortages to laws that undermine their efforts whether or not they were meant to do so.<sup>14</sup> Additional challenges persist at the micro-level. Determining the relative significance of a given property for regulatory purposes can easily result in difficult, if not arbitrary, decisions by historic commissions as their members find themselves routinely treading that fine line between historical significance and mere aesthetics, if not

---

<sup>12</sup> STATE OF NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, DIVISION OF PARKS AND FORESTRY, HISTORIC PRESERVATION OFFICE, NEW JERSEY HISTORIC PRESERVATION COMMISSION DIRECTORY, 1999; *SEE ALSO*, JACOB H. MORRISON, HISTORIC PRESERVATION LAW (2d ed. 1965). Morrison chronicles the country's slow start in preservation efforts, along with its increasing interest toward the mid-twentieth century as represented by the growing number of state laws and city ordinances at the time. According to his research, Charleston, South Carolina, became the first city to zone a historic district in 1931. New Orleans, Louisiana, followed a few years later with the designation of its Vieux Carre. San Antonio, Texas, came next with the designation of its La Villita, which in turn was followed by a host of other locations in Virginia, North Carolina, Washington D.C. (Georgetown), New Mexico, Kentucky, Maryland and Massachusetts.

<sup>13</sup> STATE OF NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, NATURAL AND HISTORIC RESOURCES, HISTORIC PRESERVATION OFFICE, ANNUAL REPORT, (2005).

<sup>14</sup> AMERICAN PLANNING ASSOCIATION, POLICY GUIDE ON HISTORIC AND CULTURAL RESOURCES (1997), <http://www.planning.org/policyguides/historic.htm>. The American Planning Association, a nonprofit public interest and research organization committed to urban, suburban, regional and rural planning, identifies several continuing threats to historic preservation efforts, including: diminished funding for preservation at the federal and state levels; the impact of transportation projects on cultural resources; legislative enactments designed to preempt state and local preservation laws; the private property rights movement and its attack on preservation programs at the local level; development resulting in either demolition or retention only of building facades; ignorance of archaeological resources; subordination of historic preservation to other design concerns.

personal taste.<sup>15</sup> Enforcing such decisions and maintaining the integrity of designated properties and districts typically involve overworked enforcement officers and the minimal penalties of small fines for violators, if any are assessed at all.<sup>16</sup> In many cases, owners of designated properties may simply ignore these rules and make historically compromising alterations without ever seeking permission or certification from the commission that oversees the given district.<sup>17</sup>

The relative success of a given historic preservation program can turn as well on the general affluence or economic well-being of the community in which it is located.<sup>18</sup> More stable communities with a standing, less transient population and a thriving downtown, a main street or tourist draw, tend to fare best, given the minimal motivation to compromise historic resources in order to address other local ills, such as rampant blight or a shortage of housing.<sup>19</sup> Consider three southern New Jersey communities. In Haddonfield, in Camden County, a small relatively wealthy population holds a vested interest as well as the means to preserve the character of its small town.<sup>20</sup> Woodbury, in Gloucester County, on the other hand represents a more middle-class town with a struggling commercial district, and the guidelines for the overlapping historical district are considered by some as a burdensome overregulation to homeowners already beset by high local property taxes, or to other property owners who may be starting a new business, or maintaining an existing one, in a downtown that may or may not make a comeback.<sup>21</sup> By comparison, Bridgeton, in Cumberland

---

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> Rose, *supra* note 6.

<sup>19</sup> *Id.*

<sup>20</sup> Borough of Haddonfield, New Jersey, Historic Preservation Commission, [http://www.haddonfieldnj.org/borough\\_historicdistrict.php](http://www.haddonfieldnj.org/borough_historicdistrict.php) (last visited May 9, 2007).

<sup>21</sup> Woodbury Historic Preservation Commission, <http://woodbury.nj.us/hpc.shtml>; City of Woodbury, New Jersey,

County, is a small and impoverished, crime-addled city whose entire 6.5 square miles have been designated historic, resulting in the state's largest preserved district.<sup>22</sup> Still, social problems of the day hold sway, and the need for affordable housing and tax-generating commercial properties has overtaken preservation as a priority for the local governing body, which presently is seeking permission to reduce the preserved district's size so as to encourage the clearance of older buildings and the development of new ones in certain areas.<sup>23</sup>

This note explores the hurdles confronting the future of historic preservation in New Jersey. It first will provide a basic overview of the legislative foundation and framework for historic preservation, the forms that preservation efforts typically assume, and the means of oversight used to maintain and protect designated sites and neighborhoods. It then will discuss the evolution of the underlying legal rationales that permitted the courts to gradually offer increasing support for preservation efforts in the first place. Finally, it will illustrate the major criticisms of, and the common hurdles before, historic preservation movements, with particular application to the situation in New Jersey.

## II. HISTORIC PRESERVATION IN PRACTICE: FOUNDATIONS, STANDARDS AND OVERSIGHT

### A. LEGISLATIVE FOUNDATIONS AND FRAMEWORK

Historic preservation efforts serve the basic purpose of protecting from alteration or destruction architecturally or historically significant sites and neighborhoods through planning and zoning guidelines and regulations set forth by

---

<http://woodbury.nj.us/>; *see also* Main Street Woodbury, <http://www.mainstreetwoodbury.org/> (last visited May 9, 2007).

<sup>22</sup> City of Bridgeton, New Jersey, <http://www.co.cumberland.nj.us/govtserv/municipalityview.asp?interest=tourism&fldMunicipality=Bridgeton> (last visited May 9, 2007).

<sup>23</sup> *Id.*

legislatures or local governing bodies.<sup>24</sup> Congress initially established the first national register of landmarks and properties of national importance through the Historic Sites Act of 1935.<sup>25</sup> It then, in 1966, passed the National Historic Preservation Act and thereby established the National Register of Historic Places, which to this day remains the official list of national historic resources deemed worth preserving.<sup>26</sup> The National Register, which covers entire districts as well as individually significant buildings, structures, sites and objects, confers basic benefits that include recognition of significance, eligibility for federal investment tax credits for renovations of income-producing properties, and protective consideration during the planning of federal or federally assisted projects.<sup>27</sup>

---

<sup>24</sup> See, e.g., N.J. STAT. ANN. § 40:55D-107 (West 2007); STATE OF NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, DIVISION OF PARKS AND FORESTRY, HISTORIC PRESERVATION OFFICE LOCAL TOOLS FOR HISTORIC PRESERVATION, , <http://www.state.nj.us/dep/hpo/3preserve/local.htm#clg>; STATE OF NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, DIVISION OF PARKS AND FORESTRY, HISTORIC PRESERVATION OFFICE, MUNICIPAL LAND USE LAW, NEW JERSEY STATUTES ANNOTATED HISTORIC PRESERVATION RELATED SECTIONS, , <http://www.state.nj.us/dep/hpo/3preserve/mlul.pdf>; National Historic Preservation Act, 16 U.S.C. § 470; STATE OF NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, DIVISION OF PARKS AND FORESTRY, HISTORIC PRESERVATION OFFICE, NEW JERSEY HISTORIC PRESERVATION COMMISSION DIRECTORY (1999) <http://www.state.nj.us/dep/hpo/3preserve/hpcdirectory99.pdf>

<sup>25</sup> 16 U.S.C. § 461.

<sup>26</sup> 16 U.S.C. § 470; See, e.g., *Morris County Trust for Historic Preservation v. Pierce*, 714 F.2d 271 (3d Cir. 1983). This case involved a dispute in the Town of Dover, New Jersey, over an urban renewal plan submitted by the town and approved by the U.S. Department of Housing and Urban Development (HUD). *Id.* at 273. The plan called for the demolition of every house and property along a certain street, one of which was the town's first general public building, constructed in 1829 and generally known as the Old Stone Academy. *Id.* Given its history, local preservationists filed suit to save the building and the Third Circuit ultimately granted a permanent injunction to prevent its demolition. *Id.* at 282. The court further required HUD to conduct a cultural and historical resource review pursuant to the National Historic Preservation Act, holding that the federal agency was required to comply with the preservation law because it maintained discretionary authority over the town's plans and could withhold federal funding. *Id.*

<sup>27</sup> Scott, *supra* note 11; see also Shull, *The Use of Tax Incentives for Historic Preservation*, 8 CONN. L. REV. 334 (1976).



The Act itself further authorizes the creation of individual historic preservation programs within each state in order to process nominations to the National Register, implement state and federal programs, and provide general assistance.<sup>28</sup>

At the state level, the New Jersey Register of Historic Places Act of 1970 set forth the state's official list of historic resources, one that remains for the most part modeled after the National Register in terms of nomination of properties and determinative criteria for eligibility.<sup>29</sup> Like the National Register, the State Register provides certain tax benefits, official recognition and thus protective review in the face of public projects that might entail adverse effects on a given property.<sup>30</sup>

From a preservationist's perspective, the problem is that neither the federal nor the state register affords any protection to designated properties that prevents or controls the actions of private owners (as opposed to governmental actors), who typically remain free to alter, renovate or demolish their holdings at will subject to local zoning laws.<sup>31</sup> It is through those local laws, however, that municipal governments themselves can more effectively designate and regulate historic properties or

---

<sup>28</sup> Scott, *supra* note 11, at 2.

<sup>29</sup> *Id.*; see also N.J. STAT. ANN. § 13:1B-15.128. *et seq.* (West 2007)

<sup>30</sup> Scott, *supra* note 11; see also PRESERVATION NEW JERSEY, [http://www.preservationnj.org/take\\_action/take\\_action.asp?ss3id=3](http://www.preservationnj.org/take_action/take_action.asp?ss3id=3); S. B. 1416, 211th Leg., (N.J. 2004), available at [http://www.njleg.state.nj.us/2004/Bills/S1500/1416\\_I1.HTM](http://www.njleg.state.nj.us/2004/Bills/S1500/1416_I1.HTM); Assemb. B. A781, 211th Leg., (N.J. 2004), available at [http://www.njleg.state.nj.us/2004/Bills/A1000/781\\_I1.HTM](http://www.njleg.state.nj.us/2004/Bills/A1000/781_I1.HTM); The Historic Property Reinvestment Act, proposed legislation introduced by the New Jersey State Legislature (Senate Bill S1416, Assembly Bill A781) in early 2004, would provide a credit under the gross income tax or the corporation business tax equal to twenty-five percent of the cost of rehabilitating a historic property owned by the taxpayer, home or business owner. Under the proposed provisions, the property must be used for either residential or commercial purposes and be listed on the New Jersey Register of Historic Places, the National Register of Historic Places, or both registers. At least 60 percent of rehabilitation must be for exterior work and all rehabilitation work must be in keeping with the Secretary of the Interior's Standards for Treatment of Historic Properties.

<sup>31</sup> Scott, *supra* note 11, at 2-3.



areas.<sup>32</sup> The state's Municipal Land Use Law delegates express authority to local governing bodies to conduct historic preservation zoning, specifically by identifying, designating and regulating historic resources within the borders of their respective communities.<sup>33</sup>

---

<sup>32</sup> This local posturing did not occur without controversy. Initially, the New Jersey State Supreme Court strictly limited the powers of historic preservation commissions to designate and regulate local properties, holding that they cannot act beyond the powers expressly delegated by the state legislature to local governing bodies through the state's Municipal Land Use Law. *Estate of Neuberger v. Middletown*, 521 A.2d 1336 (1987). This decision compelled the state legislature to respond with an amendment to New Jersey's Municipal Land Use Law to specifically delegate to municipalities the power to identify and designate historic sites and districts through their local planning and zoning processes. *See Scott, supra* note 11.

<sup>33</sup> *See* N.J. STAT. ANN. § 40:55D-1 (West 2007). Section 40:55D-65.1 (Designation and regulation of historic sites or historic districts) provides:

A zoning ordinance may designate and regulate historic sites or historic districts and provide design criteria and guidelines therefor. Designation and regulation pursuant to this section shall be in addition to such designation and regulation as the zoning ordinance may otherwise require. Except as provided hereunder, after July 1, 1994, all historic sites and historic districts designated in the zoning ordinance shall be based on identifications in the historic preservation plan element of the master plan. Until July 1, 1994, any such designation may be based on identifications in the historic preservation plan element, the land use plan element or community facilities plan element of the master plan. The governing body may, at any time, adopt, by affirmative vote of a majority of its authorized membership, a zoning ordinance designating one or more historic sites or historic districts that are not based on identifications in the historic preservation plan element, the land use plan element or community facilities plan element, provided the reasons for the action of the governing body are set forth in a resolution and recorded in the minutes of the governing body.

Section 40:55D-107 (Historic preservation commissions; creation by ordinance; members; qualifications; appointment; term of office; vacancies; officers; voting; prohibition of personal interests; removal) provides, in pertinent part:

- a. The governing body may by ordinance provide for a historic preservation commission.
- b. Every historic preservation commission shall include, in

## B. STANDARDS AND OVERSIGHT

The most common preservation-based efforts thus take the form of local zoning ordinances, which establish a reviewing body or commission and set forth the methods of designating either individual structures or whole districts as “historic,” and of assessing applications by property owners to alter designated properties or structures that fall within designated districts.<sup>34</sup> Standards regarding what should be considered “historic” for preservation and regulatory purposes vary from one place to the

---

designating the category of appointment, at least one member of each of the following classes:

Class A--a person who is knowledgeable in building design and construction or architectural history and who may reside outside the municipality; and  
Class B--a person who is knowledgeable or with a demonstrated interest in local history and who may reside outside the municipality....

Section 40:55D-109 (Responsibilities) provides:

The historic preservation commission shall have the responsibility to:

- a. Prepare a survey of historic sites of the municipality pursuant to criteria identified in the survey report;
- b. Make recommendations to the planning board on the historic preservation plan element of the master plan and on the implications for preservation of historic sites of any other master plan elements;
- c. Advise the planning board on the inclusion of historic sites in the recommended capital improvement program;
- d. Advise the planning board and board of adjustment on applications for development pursuant to section 24 of this amendatory and supplementary act;
- e. Provide written reports pursuant to section 25 of this amendatory and supplementary act on the application of the zoning ordinance provisions concerning historic preservation; and
- f. Carry out such other advisory, educational and informational functions as will promote historic preservation in the municipality.

<sup>34</sup> See, e.g., WOODBURY, N.J. CODE § 202 Zoning, art. VIII; Historic Preservation District, §§ 202-33 – 45.

next, but most find some basis in the criteria set forth by the National Register of Historic Places.<sup>35</sup>

Such standards range in effect, from prohibiting “incongruous” structures that conflict with preexisting surroundings, to preventing the demolition of older structures, and even to requiring owners to restore and maintain unwanted, older properties.<sup>36</sup> These standards, codified within the guidelines of a given local zoning ordinance, address the fundamental question that typically arises, being, what structures, or which features of a given structure, necessarily contribute to a given historic site or district and thus warrant preservation. Often enough, the answer merely asserts a requirement of uniformity or conformity with whatever is already there.<sup>37</sup> While new construction within historically preserved areas generally tends to be limited, when it occurs, it too remains subject to often strict requirements that assert similar demands of conformity with the immediate area’s

---

<sup>35</sup> See Rose, *supra* note 6, at 496; see also National Trust for Historic Preservation, *Recommended Model Provisions for a Preservation Ordinance with Annotations* (1980).

<sup>36</sup> See Rose, *supra* note 6, at 507. To illustrate the requirement to maintain, Rose offers the case of *Maher v. City of New Orleans*, 516 F.2d 1051 (5th Cir. 1975), in which a property owner sought to demolish a Victorian cottage beside his home in the city’s historic Vieux Carre district. After protracted litigation, the courts sided with the city and, first, denied the property owner permission to do destroy the cottage, and then required him to perform minimum maintenance on the rundown building since the structure, given its age and character, “contributed to the whole.” *Id.*

<sup>37</sup> See Rose, *supra* note 6, at 510. Rose cites several district ordinances and statutes that illustrate the point. For example, ordinances in Atlanta, Georgia, and Nantucket, Massachusetts, prohibit alterations that are “obviously incongruous with surrounding structures due to the design, arrangement, materials or color.” *Id.* at 508. Regulations in many southern and western municipalities prescribe specific architectural styles that often stem from their Latin traditions, such as the requirement by the historic district in Santa Fe, New Mexico, that new construction must conform to a “Santa Fe” style that the local ordinance describes in detail, or the designation in Nevada City, California, of the appropriate style, being “Mother Lode.” *Id.* Regulations in Savannah, Georgia, assess proposed construction on the basis of “relatedness criteria” that favors designs that resemble those of preexisting neighbors with regard to height, roof, shape, materials and color. *Id.*

existing historic character.<sup>38</sup> Given the need for flexibility under such circumstances, governing standards often incorporate language and descriptions that are less than specific, and in ways that occasionally have resulted in legal challenges by property owners asserting claims of ambiguity or vagueness.<sup>39</sup>

---

<sup>38</sup> *Id.* at 510-512. Again, Rose cites several examples. The historic district in Exeter, New Hampshire, requires that new buildings within the district can take on a more modern design so long as it “harmonizes” with older neighboring buildings. *Id.* at 511. The district ordinance of Charleston, South Carolina, specifies that a structure’s “inappropriateness” may result from “[a]rresting and spectacular effects, violent contrasts of materials or colors and intense or lurid colors, a multiplicity or incongruity of details resulting in a restless and disturbing appearance, [or] the absence of unity and coherence in composition not in consonance with the dignity and character of the present structure ... or with the prevailing character of the neighborhood.” *Id.* An ordinance in Chillicothe, Ohio, provides that “[a]ttention shall be taken to avoid the environmentally harmful effect often created by the clash of undisguised contemporary materials with those of older origin, such as aluminum or other metals, plastic, fiberglass and glass improperly used with brick, stone, masonry and wood.” *Id.* The preservation commission of the former mining town, now ski resort, of Park City, Utah, bases its criteria on local nineteenth-century construction practices that describe approved vertical designs, pitched roofs and natural materials, as well as subjects of likely rejection – such as “Swiss Chalet” or “A-frame” buildings and the use of aluminum siding. *Id.* at 512.

<sup>39</sup> See *Anderson v. City of Issaquah*, 851 P.2d 744 (Wash. Ct. App. 1993). Here, a developer sought approval to construct a 6,800 square-foot commercial building for rental purposes, specifically, a white stucco building with large windows and a blue metal roof. *Id.* at 746. The local development commission denied permission, asserting that the design conflicted with the location, which marked a transition point between what was considered the old downtown and the new village style construction. *Id.* at 747. The guidelines on which the commission rendered its decision indicated, in part, that:

...structures shall be made compatible with adjacent buildings of conflicting architectural styles by such means as screens and site breaks, or other suitable methods and materials... Harmony in texture, lines, and masses shall be encouraged... Evaluation of a project shall be based on quality of its design and relationship to the natural setting of the valley and surrounding mountains... Building components, such as windows, doors, eaves and parapets, shall have appropriate proportions and relationship to each other... Colors shall be harmonious, with bright or brilliant colors used only for minimal accent... Monotony of design in single or multiple building projects shall be avoided. Efforts should be made to create an interesting project by use of complimentary details, functional orientation of buildings, parking and access

Responsibility for the enforcement of a given ordinance's provisions typically falls upon a committee or commission that usually includes professionals in relevant fields, such as architecture, history, real estate or construction.<sup>40</sup> The enforcement powers of a given local committee or commission vary. In New Jersey, a historic preservation commission's status as either a regulatory authority or a mere advisory board determines the extent of its ability to enforce local preservation guidelines and compel property owners therein to abide by those rules.<sup>41</sup> Regulatory commissions with more binding decision-making authority are empowered to render decisions that call for greater deference from the other local governing bodies, the planning and zoning boards, through which they derive their power. This often affords the districts they oversee a much greater chance of remaining viably preserved, in part because it also renders the local government there eligible for certain preservation-based grants and funds to which it

---

provisions and relating the development to the site. *Id.* at 746-747.

The state appellate court reversed the decision, ordered that certification for construction be granted, and held that the applicable guidelines were unconstitutionally vague in a way that left the commissioners too much discretion to render ad hoc determinations based on their own subjective views. *Id.* at 755. According to the court, "[a]esthetic standards are an appropriate component of land use governance. Whenever a community adopts such standards they can and must be drafted to give clear guidance to all parties concerned. Applicants must have an understandable statement of what is expected from new construction." *Id.* *But see* *Nadelson v. Twp. of Millburn*, 688 A.2d 672 (N.J. Super. Ct. Law Div. 1996). In *Nadelson*, a property owner challenged the historic preservation provisions of his town's zoning ordinance as unconstitutionally vague, but lost because the court there found that the standards set forth were supported by adequate supplementary criteria. To note, the regulations before the *Anderson* Court were more purely aesthetic-based than those at issue in *Nadelson*, which specifically involved a historic district. *See also* George B. Abney, Comment, *Florida's Local Historic Preservation Ordinances: Maintaining Flexibility While Avoiding Vagueness Claims*, 25 FLA. ST. U. L. REV. 1017 (1998).

<sup>40</sup> *See supra* notes 33-35.

<sup>41</sup> N.J. STAT. ANN. §§ 40:55D-107-112 (West 2007).

otherwise may be denied access.<sup>42</sup> More typically, however, preservation commissions take the form of panels more minimally empowered and usually serving as mere advisory boards to superior local governing bodies. These commissions review applications and render recommendations in the form of “certificates of appropriateness,” which are then forwarded to the final authority, often a planning or zoning board, which can freely amend or outright reject the commission’s decisions.<sup>43</sup>

New Jersey state law and the state’s courts afford municipal governing bodies and agencies, such as historic preservation commissions and planning and zoning boards, “substantial deference” with respect to decisions they render on local

---

<sup>42</sup> The Historic Preservation Commission in the City of Cape May, Cape May County, for example, has decision-making authority, and this has allowed it to maintain its district with some of the strictest enforcement in the state. City of Cape May, Ask the HPC, [http://www.capemaycity.com/ask\\_hpc.htm](http://www.capemaycity.com/ask_hpc.htm) (last visited May 9, 2007). See STATE OF NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, DIVISION OF PARKS AND FORESTRY, HISTORIC PRESERVATION OFFICE, LOCAL TOOLS FOR HISTORIC PRESERVATION, <http://www.state.nj.us/dep/hpo/3preserve/local.htm>. New Jersey’s Certified Local Government (CLG) program offers municipalities the option of participating more directly in state and federal historic preservation programs, so long as that municipality has a historic preservation ordinance as well as a historic preservation commission (typically one empowered to review applications and render binding decisions of its own) that conforms to the standards set forth in both the state’s Municipal Land Use Law and the National Park Service-approved New Jersey Certified Local Government Guidelines. Once certified, a given municipality becomes eligible to apply for grants from the nationally subsidized Historic Preservation Fund to use for various local preservation activities. Moreover, the state Historic Preservation Office, which determines how the majority of money from that fund will be used for preservation-oriented activities throughout the state, must annually set aside at least 10 percent of the fund solely for use by the state’s Certified Local Governments (which, in turn, can freely decide how to allocate that money for local preservation needs). See STATE OF NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, DIVISION OF PARKS AND FORESTRY, HISTORIC PRESERVATION OFFICE, NEW JERSEY’S CERTIFIED LOCAL GOVERNMENT GUIDELINES (2002), <http://www.state.nj.us/dep/hpo/3preserve/clgguides.pdf>.

<sup>43</sup> The historic preservation commission in Woodbury, Gloucester County, for example, serves in a mere advisory capacity to the city’s planning/zoning board. Woodbury’s Historic Preservation Commission, <http://woodbury.nj.us/hpc.shtml> (last visited May 9, 2007).

matters.<sup>44</sup> State courts recognize that “because of the knowledge possessed by local board members of local conditions and interests, they are best equipped to determine the merits of variance applications.”<sup>45</sup> As such, they will disturb the decisions of such commissions and boards only if they are found to be “arbitrary, unreasonable, or capricious, or if they are violative of statutory guidelines.”<sup>46</sup> In this respect, zoning ordinances themselves carry a presumption of validity, and the “party attacking the ordinance bears the burden of overcoming this presumption.”<sup>47</sup> Naturally, once rendered by a given commission or board, decisions on local matters such as those involving historic districts typically remain unchallenged, which explains in large part the lack of extensive state case law on matters of historic preservation.

### III. LEGAL AND POLICY RATIONALES FOR PRESERVATION

#### A. REGULATION OF AESTHETICS

Met with initial rejection by the courts, the use of aesthetics as a justifying basis for zoning and land use regulations over a

---

<sup>44</sup> Scully-Bozarth Post # 1817 of the VFW v. Planning Bd., 827 A.2d 1129, 1139 (N.J. Super. Ct. App. Div. 2003). In this case, the Burlington City Planning Board rejected an application by the local VFW post for a use variance to expand its already nonconforming use by displaying a tank (as a veterans memorial) in front of the historic building that served as its headquarters. *Id.* at 1130. The VFW post appealed the decision in state court, but the court ultimately upheld the planning board’s decision, despite the fact that the board offered minimal, if any, public discussion, debate or deliberation on the matter. *Id.* at 1131. The court cited N.J. STAT. ANN. § 40:55D-10g, which governs hearings conducted by municipal agencies, in its holding that the board’s decision need be supported only by a resolution and that no discussion was required. *Id.* at 1137-1138.

<sup>45</sup> *Id.* at 1139.

<sup>46</sup> *Id.*

<sup>47</sup> Damurjian v. Bd. of Adjustment of the Twp. of Colts Neck, 690 A.2d 655, 659 (N.J. Super. Ct. App. Div. 1997) (citing Riggs v. Long Beach Tp., 538 A.2d 808, 812 (N.J. 1988)).



person's property has only gained gradual judicial acceptance during the past several decades.<sup>48</sup> Over time, the courts have become willing to expand the legal meaning of the term, "aesthetics," in ways permitting its increasingly frequent application.<sup>49</sup> What was first considered a purely subjective matter eventually became viewed as a more definable concept as the courts devised objective analyses to evaluate and, in many instances, uphold aesthetic-driven ordinances, particularly those targeting nuisance-type harms.<sup>50</sup> From a legal perspective, within the context of planning and zoning ordinances, "aesthetics" soon came to refer at times to a sort of "associational harmony," a view that transcended determinations of visual beauty to instead account for "shared human values" and a community's need for "cultural stability."<sup>51</sup> This, in turn, provided ample justification for aesthetic-based regulations and ordinances such as those that preserved

---

<sup>48</sup> See generally James P. Karp, *The Evolving Meaning of Aesthetics in Land-Use Regulation*, 15 COLUM. J. ENVTL. L. 307 (1990) [hereinafter Karp].

<sup>49</sup> Id. at 308-309.

<sup>50</sup> Id. at 309.

<sup>51</sup> Id. at 309. Karp provides several decisions that reflect the often "local" nature of such "shared human values." For example, the New Hampshire State Supreme Court in *Piper v. Meredith*, 266 A.2d 103, 108 (N.H. 1970), made specific reference to the protection "of the atmosphere of the town." Karp at 325. The Idaho Supreme Court in *Dawson Enterprises v. Blaine County*, 567 P.2d 1257, 1269 (Idaho 1977), upheld zoning designed to protect the rural character of the county. Karp at 325. In *People v. Goodman*, 290 N.E.2d 139, 142 (N.Y. 1972), the New York Court of Appeals held that courts may consider the "setting" of the regulated community in determining the reasonableness of aesthetic regulation. Karp at 325. And the Ohio Supreme Court, in *Franchise Developers v. City of Cincinnati*, 505 N.E.2d 966, 971 (Ohio 1987), upheld special regulations that sought to "promote the overall quality of urban life." Karp at 325. Karp additionally points to the changeable nature of "shared human values." He specifically cites the Michigan State Supreme Court's holding in *Robinson Township v. Knoll*, 302 N.W.2d 146 (Mich. 1981), that times had changed such that mobile homes could no longer remain strictly creatures of mobile home parks, that instead, municipalities were to decide from case to case whether a given mobile home adhered to that community's normal aesthetic standards. Karp at 325.



landmarks and historic districts while protecting environments considered fragile or unique.<sup>52</sup>

Until the mid-1920's, courts refused to consider aesthetics as an appropriate basis for regulating land use under state police power. They did so for various reasons, but most notably due to concerns for preventing the unjustified public invasion of private property rights by governmental entities seeking to derive a public benefit at the expense of a private landowner.<sup>53</sup> Courts of the time also took issue with what they deemed the subjective nature of aesthetics which, as such, represented an invalid basis for regulation given the arbitrariness that inevitably results from a lack of objective standards.<sup>54</sup> From the mid 1920s through the 1960s, however, the courts slowly came to acknowledge aesthetics as a valid basis for such regulation, but only when the rationale was coupled with more traditionally accepted applications of police power, such as the protection of public health or the maintenance of property values or traffic safety – which, together, became the public's interest on one half of the balancing scale, which the court set against the detrimental impact to private landowners on the other half.<sup>55</sup> While the justification of aesthetics alone may have failed to support a given regulation during this period, it began to pose an increasingly influential factor.<sup>56</sup>

The United States Supreme Court signified the turning point in 1954 with its decision in *Berman v. Parker*, an urban renewal case where the Court expanded its conception of the “public welfare” to include values that are “spiritual as well as physical,

---

<sup>52</sup> *Karp* at 309-310.

<sup>53</sup> *Id.* at 310 n.17 (citing *City of Passaic v. Patterson Bill Posting, Advertising & Sign Painting Co.*, 62 A. 267, 268 (1905)) (“Aesthetic considerations are a matter of luxury and indulgence rather than of necessity, and it is necessity alone [specifically, prevention of harm to the public] which justifies the exercise of the police power to take private property without compensation.”).

<sup>54</sup> *Id.* at 310-311.

<sup>55</sup> *Id.* at 311.

<sup>56</sup> *Id.* at 311-312 & n.25 (citing *Perlmutter v. Greene*, 182 N.E. 5, 6 (N.Y. 1932)) (asserting that “beauty may not be queen, but she is not an outcast beyond the pale of protection or respect”).

aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.”<sup>57</sup> From then on, the notion of aesthetics as a sole basis for government action via zoning regulations became more amenable to the courts, many of which embraced the view that public welfare, as a rationale for the justifiable exercise of police powers, could include the “public’s desires for comfort, happiness and an enhanced cultural life.”<sup>58</sup>

According to recent estimates, a review of state appellate court decisions shows that at least thirty-one states have, since *Berman*, followed the High Court’s lead in considering aesthetics as a valid justification for the exercise of police power

---

<sup>57</sup> *Id.* at 312 & n.28 (citing *Berman v. Parker*, 348 U.S. 26, 33 (1954)). *Berman* involved an unsuccessful challenge of federal police powers (based on the District of Columbia Redevelopment Act of 1945) by owners of a commercial property in a blighted area of the District of Columbia. The owners claimed that the condemnation of their property by the District of Columbia Land Agency, as part of an urban renewal project, was an unconstitutional taking. The Court, in rejecting the claim, held that it was within the power of the legislative branch, when enacting redevelopment legislation, to consider aesthetic considerations as well as health concerns. *Id.*

<sup>58</sup> *Id.* at 312 & n.30 (citing *Westfield Motor Sales Co. v. Town of Westfield*, 324 A.2d 113 (N.J. Super. Ct. Law Div. 1974)). In this case, an automobile dealer in a general business district challenged a local zoning ordinance that limited the size of signs used within the town. In upholding the denial of the dealer’s request for a variance, the court held that a local government could enact, within the scope of its police power, a zoning ordinance based solely upon aesthetic considerations. *Id.* Similarly, in *Wes Outdoor Advertising Co. v. Goldberg*, 262 A.2d 199 (N.J. 1970), the New Jersey State Supreme Court upheld a statute empowering the state Commissioner of Transportation to condemn and take lands for highway beautification purposes. In rejecting a challenge of the statute by various affected property owners, the Court held that restoration, preservation and enhancement of scenic beauty was a sufficient public use and, further, that “[a]lthough the extent to which each individual finds a specific landscape beautiful must be determined by a subjective test, this does not denote that there is no catholic criterion for the ascertainment of whether any scenic beauty exists in a given panorama.” *Id.* at 202. See also *John Donnelly & Sons, Inc. v. Outdoor Advertising Bd.*, 339 N.E.2d 709, 717 (Mass. 1975) (rejecting challenge to aesthetics-based zoning ordinance governing signs); *Temple Baptist Church, Inc. v. City of Albuquerque*, 646P.2d 565, 570-571 (N.M. 1982) (holding aesthetics as valid justification for zoning ordinance’s sign regulations); *Oregon City v. Hartke*, 400 P.2d 255, 261-63 (Or. 1965) (rejecting challenge to aesthetics-based zoning ordinance regulating junkyards).

in the regulation of land and property use.<sup>59</sup> State courts remain split, however, on the extent to which they permit aesthetics to inform zoning ordinances.<sup>60</sup> One study names a dozen states whose courts have held that zoning based on aesthetic considerations alone is fine, along with another dozen states whose courts have held it is not while holding instead that aesthetics can play a role but not provide the sole grounds for regulation.<sup>61</sup> The study continues to name another dozen states whose courts have noted in dictum that zoning based solely on aesthetic grounds is permissible, along with a dozen others whose courts have noted in dictum that it is not.<sup>62</sup> Then again, even when a court considers zoning based on aesthetics as a valid state action, it may nonetheless strike down the given ordinance on other grounds,<sup>63</sup> particularly in cases involving the First Amendment and free speech issues that arise when regulations target signs or expressive architecture that might conflict with its surrounding neighborhood but still arguably be considered a protected work of “art.”<sup>64</sup>

---

<sup>59</sup> Karp at 313; see also Samuel Bufford, *Beyond the Eye of the Beholder: A New Majority of Jurisdictions Authorize Aesthetic Regulations*, 48 UMKC L. REV. 125 (1980).

<sup>60</sup> See generally Kenneth Regan, Note, *You Can't Build that Here: The Constitutionality of Aesthetic Zoning and Architectural Review*, 58 FORDHAM L. REV. 1013 (1990).

<sup>61</sup> *Id.* at 1015-1016.

<sup>62</sup> *Id.*

<sup>63</sup> See, e.g., *Anderson*, 851 P.2d 744.

<sup>64</sup> See Janet Elizabeth Haws, Comment, *Architecture as Art? Not in my Neocolonial Neighborhood: A Case for Providing First Amendment Protection to Expressive Residential Architecture*, 2005 BYU L. REV. 1625 (2005) (discussing First Amendment implications of aesthetics-based zoning regulations and arguing for heightened scrutiny over such regulations when they prohibit excessive architectural similarity or difference). On a similar note, a New Jersey court in *Farrell v. Twp. of Teaneck*, 315 A.2d 424, 426-427 (N.J. Super. Ct. Law Div. 1974), spoke at length on the permissibility of zoning based on aesthetic considerations, but it nonetheless declared a local zoning ordinance that constituted a total proscription of signs (including political signs that contained protected speech) too restrictive since its authors could have written it in a way that protected local aesthetic values without preventing residents from expressing their political opinions. Typically, courts merely apply the

New Jersey courts generally consider aesthetics as a “legitimate aim of zoning,” but “one that must be accomplished within clearly defined limits” – by, for example, keeping such considerations “anchored” to other concerns that more traditionally justified the exercise of police powers, being, among other things, property values or the general welfare.<sup>65</sup>

---

much lower standard of a rational basis review when evaluating local government processes such as zoning. For example, in *Hankins v. Borough of Rockleigh*, 150 A.2d 63, 66 (N.J. Super. Ct. App. Div. 1959), the court applied a rational basis review and overturned a local zoning ordinance that prohibited modern architecture such as that which made use of flat rooftops, citing the prevalence of eclectic architecture throughout the community, some of which already had such roofs. *See also* *State ex rel. Stoyanoff v. Berkeley*, 458 S.W.2d 305, 310 (Mo. 1970) (upholding the decision of an architectural review board to prohibit the construction of a pyramid shaped modern house in a neighborhood of homes that adhered to more traditional designs:

[T]he aesthetic factor to be taken into account by the Architectural Board is not to be considered alone. Along with that inherent factor is the effect that the proposed residence would have upon the property values in the area. In this time of burgeoning urban areas, congested with people and structures, it is certainly in keeping with the ultimate ideal of general welfare that the Architectural Board, in its function, preserve and protect existing areas in which structures of a general conformity of architecture have been erected. The area under consideration is clearly, from the record, a fashionable one. In *State ex rel. Civello v. City of New Orleans*, 154 La. 271, 97 So. 440, 444 [(La. 1923)], the court said, “If by the term ‘aesthetic considerations’ is meant a regard merely for outward appearances, for good taste in the matter of the beauty of the neighborhood itself, we do not observe any substantial reason for saying that such a consideration is not a matter of general welfare. The beauty of a fashionable residence neighborhood in a city is for the comfort and happiness of the residents, and it sustains in a general way the value of property in the neighborhood).

<sup>65</sup> *Diller & Fisher Co. v. Architectural Review Bd.*, 587 A.2d 674, 679 (N.J. Super. Ct. Law Div. 1990). Here, the court noted that the “time-honored animus of the law is that zoning power may not be exercised for purely aesthetic considerations,” *id.*, before it spoke of the more modern trend to the contrary, citing the turning point in New Jersey law as signaled by the dissent in an earlier case from 1964:

Much is said about zoning for aesthetics. If what is meant thereby is zoning for aesthetics as an end in itself, the issue may be said to be unexplored in our State, but if the question is

The New Jersey Supreme Court elaborated on a few of those “limits” in *Home Builders League of South Jersey, Inc. v. Berlin Township*, when it noted that “aesthetic qualities are best maintained through the use...of lot size, setbacks, side yards, lot coverage ratios, topographical and landscape requirements.”<sup>66</sup> In *State v. Miller*, the Court spoke of the development of New Jersey’s approach to aesthetic zoning, referring to early state case law that left no room for aesthetics, before citing *Berman* and the “modern trend to recognize aesthetics as a proper basis for land use regulation” in its holding that:

Consideration of aesthetics in municipal land use and planning is no longer a matter of luxury or indulgence. To the extent that our earlier cases may hold to the contrary, they no longer represent sound zoning law. The development and preservation of natural resources and clean, salubrious neighborhoods contribute to psychological and emotional stability and well-being as well as stimulate a sense of civic pride. We therefore hold that a zoning ordinance may accommodate aesthetic concerns. As has been recognized by the United States Supreme Court, consideration of aesthetics may be a legitimate pursuit of the police power of a state.<sup>67</sup>

---

whether aesthetics may play a part in a zoning judgment, the subject is hardly new. There are areas in which aesthetics and economics coalesce, areas in which a discordant sight is as hard an economic fact as an annoying odor or sound. We refer not to some sensitive or exquisite preference but to concepts of congruity held so widely that they are inseparable from the enjoyment and hence the value of property. Even the basic separation of industrial from commercial from residential, although obviously related to so much of the quoted statute as speaks of health and hazard, rests also on the aesthetic impact of uses upon the value of properties. *Id.* at 678, (citing *United Advertising Corp. v. Borough of Metuchen*, 198 A.2d 447, 449 (N.J. 1964)).

<sup>66</sup> 405 A.2d 381, 391 (N.J. 1979).

<sup>67</sup> 416 A.2d 821, 825 (1980). The Court further listed a number of state cases to illustrate the “value and importance of aesthetic concerns in municipal land use law, including: *United Advertising Corp. v. Borough of Metuchen*, 198 A.2d 447 (N.J. 1964) (“prohibition of outdoor off-site advertising”); *Vickers v. Twp.*

The same Court spoke similarly a decade later, but nonetheless stressed the line drawn in the sand with its holding that, although the concept is closely interconnected with notions of the general welfare, aesthetics or “ambiance alone can seldom be a proper basis” for zoning regulations.<sup>68</sup>

## B. REGULATION OF HISTORIC RESOURCES: HISTORIC ZONING AND PRESERVATION

The broadening notion of aesthetics in a legal sense, particularly as a rationale for land use regulation, suggests an increasing inclination by the courts to acknowledge the legitimate state interests in maintaining and enforcing a sort of harmony between people and the environment they inhabit.<sup>69</sup>

---

Comm. of Gloucester, 181 A.2d 129, 134 (N.J. 1962), *appeal dismissed and cert. denied*, 371 U.S. 233 (1963) (“prohibition of trailer camps and parks in an industrial zone”); Napierkowski v. Twp. of Gloucester, 150 A.2d 481, 488 (N.J. 1959) (“regulation of trailer parking”); Pierro v. Baxendale, 118 A.2d 401, 408 (N.J. 1955) (“prohibition of hotels and motels in residential district”); Fischer v. Bedminster Twp., 93 A.2d 378, 383 (N.J. 1952) (“minimum lot size of five acres upheld”); Lionshead Lake, Inc. v. Twp. of Wayne, 89 A.2d 693 (1952), *appeal dismissed*, 344 U.S. 919 (1953) (“minimum square feet for homes upheld”); State v. J. & J. Painting, 400 A.2d 1204 (N.J. Super. Ct. App.Div.1979) (“regulation of signs in residential zone”); Twp. of Livingston v. Marchev, 205 A.2d 65, 67 (N.J. Super. Ct. App. Div. 1964) (“regulation of trailer parking”); Westfield Motor Sales Co. v. Westfield, 324 A.2d 113, 117 (N.J. Super. Ct. Law Div. 1974) (“regulation of signs in business district”); Farrell v. Twp. of Teaneck, 315 A.2d 424, 427 (N.J. Super. Ct. Law Div. 1974) (“regulation of signs in residential zone”); Klotz v. Bd. of Adjustment, 217 A.2d 168, 169 (N.J. Super. Ct. Law Div. 1966) (“regulation of height of front yard fences”); *cf.* Agins v. Tiburon, 447 U.S. 255, 260 (1980) (“zoning law designed to protect residents from ill effects or urbanization legitimate exercise of police power”).

<sup>68</sup> Burbridge v. Governing Body of Twp. of Mine Hill, 568 A.2d 527, 536 (N.J. 1990).

<sup>69</sup> Karp, *supra* note 48, at 328.

The merger of beauty and truth in land use law today may be known as aesthetics. Beauty represents those things enjoyed by the human senses, coupled with human necessity. Truth, in an environmental sense, is human action that is as compatible as possible with the biosphere that sustains its living web rather than inexorably destroying it. Aesthetics brings these human and environmental values together in land use regulation. This type of sweeping generality is not very comforting to a legal



Such considerations play a crucial role in preservation-based land use regulation, in which case courts have become even more inclined to acknowledge the legitimacy of aesthetic objectives.<sup>70</sup> In considering the constitutionality of a given zoning ordinance, courts have come to regard the preservation of buildings and places with special historic, architectural or cultural significance to represent an important government objective.<sup>71</sup>

One study identified three dominant judicial rationales used by the courts to justify historic preservation efforts and uphold governmental activities to that end.<sup>72</sup> The first and earliest approach considered preservation as a means of inspiration, of

---

analyst. Yet the analyst may derive comfort from the realization that the progressive divorce of humans from their environment may be ending. Forty years ago Aldo Leopold said that “conservation is a state of harmony between men and land.” The acceptance in law of a broadened meaning for aesthetics is a tentative attempt to grasp for that harmony. *Id.*

<sup>70</sup> See Rose, *supra* note 6.

<sup>71</sup> *Trs. of Union Coll. in Town of Schenectady in State of N.Y. v. Members of Schenectady City Council*, 690 N.E.2d 862, 865 (N.Y. App. Ct. 1997) (“The preservation of structures and areas with special historic, architectural or cultural significance is surely an important governmental objective.”); see also *A-S-P Associates v. City of Raleigh*, 258 S.E.2d 444 (N.C. 1979), in which the North Carolina State Supreme Court affirmed a local ordinance creating a historic district. This court held that efforts to control the exterior appearance of buildings served the purpose of preserving the “state’s legacy of historically significant structures,” thus providing a visual medium for “understanding our historic and cultural heritage,” an understanding that afforded a “valuable perspective on the social, cultural, and economic mores of past generations of Americans.” *Id.* at 450.

<sup>72</sup> Rose, *supra* note 6, at 479-480.

[E]ach theme bears a direct relationship to a government interest often cited to justify government involvement in preservation. Civic education supports the inspirational view, promoting tourism fits comfortably with the protection of representative or meritorious structures, and the interest in revitalizing city areas to render them stable, useful, and prosperous for current and future residents accompanies the maintenance of a community’s sense of place. *Id.* at 480-481.

inspiring the observer with a sense of pride and patriotism.<sup>73</sup> The second approach regarded preservation as a means of safeguarding the artistic merit of buildings or groups of buildings and the integrity of their architectural style. Here, the courts stepped beyond mere aesthetic-based justifications to factor in the more defensible purposes of education and tourism.<sup>74</sup> Finally, the third approach considers preservation as a means of community-building, factoring in the environmental and psychological effects of preservation in a way analogous to the environmental movement's acknowledgement of the fundamental relationship between people and their surroundings.<sup>75</sup> This view asserts the importance of the sense of

---

<sup>73</sup> *Id.*; see also *United States v. Gettysburg Elec. Ry. Co.*, 160 U.S. 668 (1896). In *Gettysburg*, the Court invoked the "preservation as patriotism" rationale to uphold, as an exercise of police power based on "public purpose," the condemnation of property for the creation of a national battlefield memorial at Gettysburg. In so doing, the Court held that the "institutions of our country which were saved at this enormous expenditure of life and property ought to and will be regarded with proportionate affection. Here upon this battlefield is one of the proofs of that expenditure, and the sacrifices are rendered more obvious and more easily appreciated when such a battlefield is preserved by the government at the public expense." *Id.* at 680-683.

<sup>74</sup> Rose, *supra* note 6, at 479-480. See, e.g., *Penn Cent. Transp. Co. v. New York City*, 366 N.E.2d 1271 (N.Y. 1977), *infra* note 90.

<sup>75</sup> Rose, *supra* note 6, at 480. On the other hand, there is the opposing extreme at which end lies, for example, the "ageographical city." See GERALD FRUG, *CITY MAKING: BUILDING COMMUNITIES WITHOUT BUILDING WALLS* 98-99 (1999).

Now, as Michael Sorkin argues, people live in a "wholly new kind of city, a city without a place attached to it," one that Sorkin calls the "ageographical city." Sorkin uses the term to describe the pastiche of highways, skyscrapers, malls, housing developments, and chain stores – the endless urban landscape of copies without an original – that constitute the place-bites (the spatial equivalent of sound-bites) of modern America. These place-bites can be combined in an infinite variety of ways, each of which makes equal sense, to represent the metropolitan area. The ageographical city, Sorkin suggests, is the urban form of the 800-number: the area code for no-place-in-particular. *Id.*



place that older structures lend to a community by giving people both an interest and an orientation in their surroundings.<sup>76</sup>

Despite their acknowledgement of the legitimacy of such objectives, New Jersey courts have held local governing bodies in check regarding their preservation-oriented activities and, in turn, have ruled in favor of challenges to historic designations and programs found to be over-reaching in their scope or improperly created in their design.<sup>77</sup> Local governments are creatures of statute that derive their powers as such through the enabling authority granted them by state legislatures.<sup>78</sup> More specifically, New Jersey municipalities derive their planning and zoning powers from the enabling authority granted by the state

---

<sup>76</sup> See *Comm'r of the District of Columbia v. Benenson*, 329 A.2d 437 (D.C. 1974). In this case, which involved a dispute between preservationists and the owners of a historic hotel in the District of Columbia, the court noted that:

[t]here may well be those who think it lamentable that this handsome old hotel may soon be demolished. Retention of fine architecture, especially in the capital of a relatively young country such as ours, lends a certain stability and cultural continuity, which can only contribute over the years to national substance. If one looks at the architecture of a city and sees only the present, the feeling of character is missing. *Id.* at 441-442.

On this note, with regard to the importance of the notion of “orientation” as a rationale for preservation, Rose offers the testimony of a park service representative made during a congressional oversight hearing in 1975. One congressman asked the representative why the hotel at issue in the case, the Willard Hotel, was historic even though, at the time, it was just 70 years old. The parks worker replied, “[A] lot of things make things historic. It is anything that gives a place a sense of place.... And if we keep tearing down everything which gives the city a sense of identity, and putting up duplicates of commercial glass boxes... how do you know where you are?” Rose, *supra* note 6, at 490 & n.83 (citing Oversight Hearing on Pennsylvania Avenue Development Plan: Hearing Before the Subcomm. on Parks and Recreation of the House Comm. on Interior and Insular Affairs, 94th Cong., 1st Sess. 65 (1975)) (statement of E. Connally).

<sup>77</sup> See *Estate of Neuberger v. Twp. of Middletown*, 521 A.2d 1336 (N.J. Super. Ct. App. Div. 1987) (invalidating historic designation due to town’s improper delegation of power to designate historic sites and districts to a “landmarks commission” rather than the historic preservation commission permitted by state law).

<sup>78</sup> See generally GERALD E. FRUG ET AL., LOCAL GOVERNMENT LAW: CASES AND MATERIALS (4th ed. 2006).

legislature through the state's Municipal Land Use Law (MLUL); thus, any local exercise of planning or zoning powers must be authorized by the authority set forth in that law.<sup>79</sup>

The MLUL specifies the promotion of historic sites and districts as one of its stated purposes, indicating that a local planning board can incorporate into its master plan "where appropriate... [a] historic preservation plan element (a) indicating the location, significance, proposed utilization and means for preservation of historic sites and historic districts, and (b) identifying the standards used to assess worthiness for historic site or district designation."<sup>80</sup> The MLUL also provides that a zoning ordinance can designate and regulate historic sites and districts, as well as incorporate design guidelines and criteria for doing so.<sup>81</sup> Amendments to the MLUL in 1985 further empower local governing bodies the authority to establish, by ordinance, local historic preservation commissions to oversee a given historic district as a sort of deputy to the local zoning board, with "important recommendatory, advisory and

---

<sup>79</sup> *Neuberger*, 521 A.2d at 1340 (citing N.J.S.A. § 40:55D-1). This statute "unequivocally provides, under the heading of 'Exclusive Authority of Planning Board and Board of Adjustment,' that any power expressly authorized by the Municipal Land Use Law to be exercised by a planning board or board of adjustment 'shall not be exercised by any other body, except as otherwise provided in this act.'" *Id.* See also *Lusardi v. Curtis Point Prop. Owners Ass'n*, 430 A.2d 881, 885 (N.J. 1981), (citing N.J. CONST. (1942) art. IV, § 6, par. 2 (asserting the state's strong policy that local governments have "the power to zone only through the legislative delegation of the state's police power")); *PRB Enters., Inc. v. South Brunswick Planning Bd.*, 518 A.2d 1099, 1102 (N.J. 1987) (the state's Municipal Land Use Law is the sole source of authority for a municipal governing body's power to impose conditions on permitted uses of land and that power is not delegable); *Piscitelli v. Twp. Comm. of Scotch Plains*, 248 A.2d 274, 279 (N.J. Super. Ct. Law Div. 1968) (citing *State of Missouri ex rel. Magidson v. Henze*, 342 S.W.2d 261 (Mo. Ct. App. 1961)) (noting the absence of statutory authorization and thus invalidating, as an improper exercise of municipal zoning power, a local ordinance delegating to an Architectural Review Board final authority to reject building plans for aesthetic reasons).

<sup>80</sup> N.J. STAT. ANN. §§ 40:55D-2, D-28(b) (West 2007).

<sup>81</sup> N.J. STAT. ANN. § 40:55D-65(i) (West 2007); See also *Neuberger*, 521 A.2d at 1342 ("the municipal body, by modification to its zoning ordinance, may superimpose the 'historic' designation upon existing zoning designations and regulations, but only under authority provided by the Land Use Law").

reporting powers.”<sup>82</sup> But the state’s courts have stressed, however, the crucial distinction between the permissible creation of a historic preservation commission as an advisory or reviewing body, and other improper delegations of non-reviewable decision-making power by local governing bodies to similar panels not permitted by the MLUL, such as “landmarks commissions” or “architecture review boards.”<sup>83</sup> New Jersey’s courts have routinely struck down improper grants of authority to such panels.<sup>84</sup>

#### IV. COMMON OPPOSITION AND HURDLES TO PRESERVATION EFFORTS

Common arguments against preservation-based zoning and land use regulations stress the adverse impact on private property rights, and the displacement of low-income residents that can result from increased property values and rental costs attributable to preserved or rehabilitated neighborhoods. Additional complications arise when local governments confront competing public interests that set the desire to preserve a given historic community against, for example, the need for a new school or medical facility within that community.

##### A. PROPERTY RIGHTS MOVEMENT

Preservation-based zoning regulations can target either all properties in a general district, or specific sites or landmark structures, those that possess some association with past events or notable people, or that, by their “artistry or by the drama or

---

<sup>82</sup> *Neuberger*, 521 A.2d at 1342 (citing N.J. STAT. ANN. §§ 40:55D-107 through 112).

<sup>83</sup> *Id.*

<sup>84</sup> See, e.g., *Piscitelli*, 248 A.2d at 279; *Neuberger*, 521 A.2d at 1342; *Diller & Fisher Co. v. Architectural Review Bd.*, 587 A.2d 674, 680 (N.J. Super. Ct. Law Div. 1990). (invalidating local ordinance creating Architecture Review Board by holding that “to the extent that zoning decisions are based upon aesthetics, these decisions are to be made by zoning and planning boards of this State pursuant to specific legislative authority and are not to be delegated absent said authority”).

oddity of [their] decoration,” provide a focal point for direction-finding or perhaps lend “legibility” to a given location or sense of pride to the community.<sup>85</sup> The regulation of historic districts, as opposed to individual sites, equally affects all properties within the district’s borders much the same way as any normal zoning and land-use regulations, applying the same restrictions and offering the same benefits to all owners, and thus remaining less likely to result in conflicts from a property-rights perspective.<sup>86</sup> The regulation of individual sites or landmarks, on the other hand, triggers the concern of property-rights advocates with regard to equity and adverse impact, since the interests of individual owners, who become singled out for special treatment, at that point are set against those of the community at large.<sup>87</sup>

Since landmark designation usually imposes restrictions on the owner’s alterations of the property, an owner may be forced to bear the burden of diminished property value and in effect to pay for the community’s preservation preferences through an assessment not placed on the owners of ordinary properties. To be sure, landmark designation may provide some benefits to some landmark owners, as the preservationists argue; designation may give the structure greater notoriety and may assure the present owner that the property will not be altered in the future. Many owners nominate their own properties for landmark status, presumably to take advantage of these benefits. But for the owner who resists landmark designation and control, the burden probably outweighs the benefits.<sup>88</sup>

Nevertheless, in such instances the courts typically uphold the preservation ordinances and guidelines while rejecting owners’ complaints, which typically invoke claims asserting that

---

<sup>85</sup> Rose, *supra* note 6, at 496-497; *see also* Chapman, *supra* note 4.

<sup>86</sup> Rose, *supra* note 6, at 497.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 497-498.

the regulations amount to a governmental taking. In this respect, the U.S. Supreme Court's current view of regulatory takings provides that "land-use regulation does not affect a taking if it 'substantially advance[s] legitimate state interests' and does not 'den[y] an owner economically viable use of his land.'"<sup>89</sup> With regard to historic preservation, the U.S. Supreme Court held the same, rejecting in *Penn Central Transportation Co. v. New York City* the notion that burdens of landmark regulation amount to a taking, at least where the property owner still retains a reasonable beneficial use.<sup>90</sup> More to the point, the Court in *Penn Central* all but embraced a custodial approach to the ownership of historical or preserved properties, given its implied assertion that owners of property deemed of special value or importance to the greater community bear an

---

<sup>89</sup> *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834 (1987) (citing *Agins v. Tiburon*, 447 U.S. 255, 260 (1980)).

<sup>90</sup> 438 U.S. 104 (1978). *Penn Central* is one of the seminal cases concerning takings jurisprudence. Here, the Court held that a city may place restrictions on the development of historic landmarks without effecting a taking requiring just compensation. The New York City Landmarks Preservation Law at the time required owners of designated properties to maintain exteriors and obtain commission approval for any alterations. The owner of Grand Central Terminal, despite its historic designation, sought to build additional office space within a high-rise building atop the station. The commission rejected the owner's plan and the owner, in turn, challenged the rejection and the regulation as an unconstitutional taking since he was being denied the ability to use the air space he "owned" above the structure. The Court first held that the city was entitled to enact such regulations through its police power as based on public welfare interests (in enhancing the quality of life by preserving the character and aesthetic features of the city). The Court then applied an ad hoc reasonableness test to the government action, considering the character of that action along with the nature and extent of the consequent interference with rights in the parcel. The Court ultimately rejected the owner's claim, particularly noting the fact that the property was not singled out for special treatment, since there were several other properties throughout the city that were subject to the preservation law. The Court also noted the availability of the owner's option to transfer the development rights in the property, to essentially sell his rights to build into the air space over the station to someone else – thus, there was no complete deprivation. *But see* *United Artists Theater Circuit, Inc. v. Philadelphia Historical Comm'n*, 595 A.2d 6, 13-14 (Pa. 1991) (invalidating, as an unconstitutional taking of property, the historical designation of United Artists' Boyd Theater building in Philadelphia, and holding that neither aesthetic reasons nor the conservation of property values qualify as justifications for the use of the police power).

obligation of sorts to protect or preserve that property for the benefit of that community.<sup>91</sup>

Still, criticism persists. Additional property-based concerns cite the stifling tendencies reinforced by historic districts when they repeatedly shy away from change, new creation or an innovation that can also play a crucial role in a given community's historical development.<sup>92</sup> In comparing historic preservation districts with the earlier urban renewal programs that destroyed many older neighborhoods, some critics find strong parallels between the two, essentially common threats to communities due to regulations that too heavily stress

---

<sup>91</sup> See generally Nicole B. Wilkes, *Public Responsibilities of Private Owners of Cultural Property: Toward a National Preservation Statute*, 24 COLUM.-VLA J.L. & ARTS 177 (2001); see also *Gardner v. N.J. Pinelands Comm'n*, 593 A.2d 251 (1991) (applying *Penn Central* to reject the takings claim of the owner of a 217-acre farm that was subject to state regulations that strictly limited the use of land in environmentally sensitive areas, and that prohibited residential development in a way that rendered his land useable for little more than agricultural purposes).

<sup>92</sup> See Rose, *supra* note 6, at 509-510, 512:

Historic district regulation, by narrowing a builder's design choices to a few approved styles, can freeze a community's architectural character to reflect some quasi-mythic time in the past, at the cost of creative contributions by current residents...Of course a communitarian argument for uniformity may be made – that similarity of design may lend “legibility” to a neighborhood or street, especially when the old buildings promote a sense of orientation through their familiarity and relationship to each other. But while uniformity may serve a purpose, there is surely a limit to its imposition short of the point of visual tedium and creative atrophy. The visible elements of the past ought not hem us in, but should rather invite us to make creative contributions of our own. Some newer thinking on historic preservation attempts to assure that historic district regulation not stifle newer styles. Historic district plans since College Hill [in Providence, Rhode Island] have allowed districts to contain a succession of styles rather than a single one... Moreover, tastes may change. The promotion of tourism may provide no long-term protection for a neighborhood's older structures. The city that is seriously pursuing tourist dollars will turn an historic district into Disneyland if that is what brings crowds. Even more important, while historic district designation can be a point of pride to a neighborhood, requirements of design uniformity can subtly inhibit the district as a community. Designation can prohibit newer elements that might lend focus and comfort to the area, and can stifle the process of change and imaginative reuse that is, after all, also an important part of a community's historic development. *Id.*

uniformity and that contribute to disruption of what tend to be low-income neighborhoods.<sup>93</sup>

## B. DISPLACEMENT

Despite its aims to preserve character and prevent change, historic preservation can actually alter, in less readily tangible ways, the communities and neighborhoods where it occurs. Such efforts consciously aim to physically improve these areas by restoring properties located within them, but they tend to result simultaneously in sweeping social or cultural upheavals among the populations that live, or rather lived, there.<sup>94</sup>

Historic districts or historic areas targeted for preservation, like earlier urban renewal zones, often consist of large, older homes that often are divided into multiple units that house low-income or ethnic minority residents.<sup>95</sup> Gradually, as preservation and rehabilitation of properties continues, property values expectedly increase for both the restored buildings as well as those surrounding them.<sup>96</sup> This ultimately drives the displacement with which critics take issue, the neighborhood-transforming shift, as escalating property values begin forcing those lower-income residents to move elsewhere.<sup>97</sup> Reasons for

---

<sup>93</sup> *Id.* at 504-505.

<sup>94</sup> The Historic Districts Council, which oversees and advocates on behalf of New York City's designated historic districts and neighborhoods, devoted its 12<sup>th</sup> annual preservation conference to the topic of "Place, Race, Money and Art: The Economics and Demographics of Historic Preservation," basically examining the effect of historic preservation on ethnic and socio-economic diversity in older communities, and its relationship to gentrification and displacement of lower-income populations. See Historic Districts Council, [http://www.hdc.org/%20e-bulletino3\\_3.htm](http://www.hdc.org/%20e-bulletino3_3.htm) (last visited May 9, 2007).

<sup>95</sup> Rose, *supra* note 6, at 513.

<sup>96</sup> *Id.*; see also Robin N. Leichenko, N. Edward Coulson and David Listokin, *Historic Preservation and Residential Property Values: An Analysis of Texas Cities*, *Urban Studies*, Vol. 38, No. 11 (2001), available at [http://geography.rutgers.edu/people/faculty/leichenko/leichenko\\_coulson\\_listokin2001.pdf](http://geography.rutgers.edu/people/faculty/leichenko/leichenko_coulson_listokin2001.pdf) (increasingly used as a tool to revive, or halt the deterioration of, central-city neighborhoods, historic designation is associated in most cases with higher property values).

<sup>97</sup> Rose, *supra* note 6, at 514:



departure include higher rents, increased pressure to sell because the market value of homes has become too high for owners to resist, or other increased costs such as those associated with property taxes and more substantial code enforcement repairs.<sup>98</sup> The average low or fixed income homeowner who can barely afford any improvements to his property to begin with will hardly be able to achieve the more costly variants of such improvements generally required by historic commissions that call for historically accurate and appropriate work, paint of a certain color, windows or roofs of a certain style.<sup>99</sup>

Preservationists are quick to counter that displacement has more to do with the housing market than with historic preservation, and that preservation programs in no way compare to the wide-spread virtual “slash-and-burn” approaches of earlier urban renewal projects.<sup>100</sup> Proponents

---

Historic districting without careful attention to communitarian concerns threatens a similar dislocation, particularly given the rehabilitation incentives of the 1976 Tax Reform Act... [R]ehabilitation in historic districts, leading to steep rent increases, will force low-income tenants to leave their old neighborhoods, without even the benefit of the Uniform Relocation Act payments that once assisted those displaced by urban renewal projects and other governmental acquisitions..

*Id.* at 513-514; see also Michael Newsom, *Blacks and Historic Preservation*, 36 LAW & CONTEMP. PROBS. 423 (1971).

<sup>98</sup> *Id.*

<sup>99</sup> Texas C-Bar, *Local Historic Preservation: Advantages and Disadvantages for Nonprofit Developers*, LEGAL MINUTE (August 2004), [http://www.texasbar.org/content/legal\\_library/pubs/downloads/legalminute\\_aug04.pdf](http://www.texasbar.org/content/legal_library/pubs/downloads/legalminute_aug04.pdf); see also *supra* note 80.

<sup>100</sup> To the question of whether historic preservation causes displacement, gentrification or the loss of a neighborhood’s ethnic character, the District of Columbia Historic Preservation Office responds that:

[c]hanges in the residential make up of a community are part of the constant evolution of a city. They are caused by a complex set of forces – including new development, ease of transportation, and changing urban lifestyles – not specifically by historic district designation. Districts are designated for a variety of reasons that relate to the social, architectural, or



further attribute resulting displacement to a number of factors, not just historic designation, and consider such changes merely another phase in the constant evolution of a given community.<sup>101</sup>

In either event, communities have responded in a variety of ways to curtail such displacement-causing tendencies, for the most part through tax breaks, grant programs<sup>102</sup> and increased

---

cultural significance of the area. Historic district designation is designed to protect and enhance the existing character of a community.

District of Columbia Historic Preservation League, *Frequently Asked Questions*, <http://www.dcpreservation.org/districtsfaq.html> (last visited May 9, 2007).

<sup>101</sup> *Id.*; *But see* Rose, *supra* note 6, at 514-515:

Preservationists are understandably sensitive about displacement, and many deny that historic districting by itself forces out low-income residents. They argue that historic districting is a result rather than a cause of middle-class interest in older neighborhoods... In any event, the tax benefits for rehabilitation in historic districts add marginally to property values and thus to long-term displacement pressures on low-income residents of eligible historic districts. The same may be said of other programs that fund historic preservation in older neighborhoods... [D]isplacement caused by historic preservation is gradual by comparison with a typical urban renewal or freeway project. But the frequency with which the displacement issue arises should suggest an underlying doubt about historic districts, since an ostensible purpose of preservation programs is to foster community ties rather than disrupt them. *Id.*

<sup>102</sup> Rose, *supra* note 6, at 515-516, offers several examples:

Savannah uses federal "section 8" housing assistance to subsidize low-income renters in the city's historic areas. San Francisco, Seattle, and other cities have used general revenue sharing or community development allocations to establish revolving funds for low-interest rehabilitation loans available to low-income owners of historic properties. The Department of the Interior gave out a challenge grant to establish a revolving loan and grant fund in the historic district in Anacostia, Maryland, a low-income area near Washington. Federal preservation officials have been particularly solicitous of neighborhood organization and low-income assistance in recent historic preservation grants to the states, stressing these goals in assessing state preservation plans. *Id.*

involvement of at-risk populations in historic designation processes and preservation programs in general.<sup>103</sup> Some groups suggest, as a means of mitigating the gentrifying effects of preserved neighborhoods, that local governments or non-profit organizations acquire as much land or property as possible before preservation occurs, establishing trust funds for such

---

<sup>103</sup> Rose, *supra* note 6, at 516-517 (citing a study of “community preservation” in Old Anacostia, Maryland, conducted by the School of Architecture at the University of Maryland in 1975):

Displacement problems are sometimes conjoined with design issues in historic districts. Anacostia, Maryland, is emerging as a show-case for an historic district project in a low-income neighborhood. But the studies preliminary to its historic designation suggest the manner in which uniform historic design criteria, meant to revitalize a low-income area, can ignore the wishes of current residents. Residents' responses to an initial survey indicated concern about housing costs and the general neatness of houses and buildings in Anacostia. The architecture student surveyors, though, seemed to care most about the original character of the Victorian cottages. They devised a set of intricately detailed guidelines for “correct” rehabilitation: “yes” to round-cut shingles, “no” to wide-slat siding and picture windows. A resident worried about cleanliness and a good coat of paint may find those directives tangential indeed. He may resent the suggestion that his planned installation of aluminum siding and a plate glass window will detract from the character of the neighborhood. He may especially resist the idea that to make any improvement at all, he must use more expensive materials and designs. Many resident resentments can be assuaged through subsidy programs and through the process of talking things over. *Id.*

For a more recent example of income-sensitive redevelopment with new affordable housing in a historic district in New Jersey, see *Bridgeton Revitalization*, Affordable Housing Design Advisor, U.S. Department of Housing and Urban Development, <http://www.designadvisor.org/green/bridgeton.php>. Bridgeton, New Jersey claims the largest historic preservation district in the state and overflows with Victorian and Craftsman style houses, but the city also suffers a continuing economic depression in large part attributable to the loss of its industrial economic base several years ago. Many, if not most, of its historic properties are in poor condition, as are its public housing units. The Bridgeton Revitalization project, the city's first such project in decades, aims to provide newer public housing for residents of varying income levels that also incorporates stylistic features, colors and designs of the surrounding historic community.

purchases and applying restrictions to the properties before then transferring them to nonprofit organizations or other such groups for use as low-income housing.<sup>104</sup> Local governments also can devise property tax freezes or financial assistance programs to subsidize renovations, provide the option of hardship waivers from duty to repair requirements, and encourage private or non-profit programs to work with participating banks to offer low interest loans for community revitalization.<sup>105</sup> Additional incentives might include tax credits to develop or maintain mixed-income neighborhoods.<sup>106</sup> Essentially, the more comprehensive and inclusive the approach, the better the balance will be between the provision of adequate safeguards for the existing population and effective historic preservation and neighborhood revitalization.<sup>107</sup>

---

<sup>104</sup> Texas C-Bar, *supra* note 99 (citing, as examples, Atlanta, Georgia and Portland, Oregon).

<sup>105</sup> *Id.*; see also National Housing Institute, *New Codes for Old Buildings*, <http://www.nhi.org/online/issues/109/subcode.html>. The New Jersey Department of Community Affairs devised its “Rehab Subcode,” which went into effect in 1998, to allow for more flexibility in the rehabilitation of older properties. Prior to the revision, such structures were subject to modern building codes that, in many cases, imposed requirements, regarding such elements as the width of halls or doors, that entailed more extensive work and, more often than not, the destruction of original and historic details. For example, instead of setting minimum width requirements for doorways, the Rehab Subcode provides for “safety ratios” between width and occupancy, ratios to which most existing “low-usage” buildings, such as housing, already conform. If they do not conform, the owner or developer can either add to the width or limit the occupancy.

<sup>106</sup> JAMES R. COHEN, *Combining Historic Preservation and Income Class Integration: A Case Study of the Butchers Hill Neighborhood of Baltimore*, *Housing Policy Debate*, Volume 9, Issue 3, Fannie May Foundation (1998), [http://www.fanniemaefoundation.org/programs/hpd/pdf/hpd\\_0903\\_cohen.pdf](http://www.fanniemaefoundation.org/programs/hpd/pdf/hpd_0903_cohen.pdf).

<sup>107</sup> *Id.*; see also Rose, *supra* note 6, at 516 (“A concern for community suggests, however, that historic district designation and control should spring at least in part from the initiative of those who have the greatest contact with the district”).

### C. COMPETING AND CONFLICTING PUBLIC WELFARE INTERESTS: DEFINING PRIORITIES

Justifications for historic preservation as an important government objective and a legitimate exercise of police powers that serve the public welfare lead to inevitable conflicts with competing interests, those that also serve the public welfare. Those other public welfare interests, if they bear a more direct and immediate impact on the community, will often outweigh any perceived need for preservation when the choice must fall one way or the other.

The public interest in education trumped historic preservation in *Trustees of Union College in Town of Schenectady in State of N.Y. v. Members of Schenectady City Council*, where the court rejected a challenge to the proposed construction of new school facilities within an existing historic district.<sup>108</sup> Similarly, the public interest in roadway safety took precedence over preservation in the New Mexico case of *Valley Community Preservation Commission v. Mineta*, where the court permitted the widening of a notoriously accident-prone highway to proceed despite the large-scale destruction of the roadway's historic homesteads and scenery that would result.<sup>109</sup>

Local decisions whether to save or not to save, to devote precious tax revenues toward the preservation of a historic site

---

<sup>108</sup> 690 N.E.2d 862, 865 (1997) (holding that public interest in historical preservation does not as a matter of law override competing educational interests, which by their very nature also are clearly in furtherance of the public morals and general welfare).

<sup>109</sup> 373 F.3d 1078 (N.M. 2004). Here, the court rejected a challenge by advocacy groups to a proposed widening project of a historic roadway, a 37.5 mile stretch of Route 70 known as the Billy the Kid National Scenic Byway. *Id.* at 1081. Federal and state authorities argued in support of the project based on the need to widen the roadway to address its "alarmingly high accident rate," which specifically amounted to twice the state average for rural undivided highways, with a fatality rate more than double the national average. *Id.* The court noted the roadway's cultural associations, "striking" scenery and historic homesteads, among other things, before it balanced the public interest in completing the project against the competing public interest in maintaining the roadway given its social significance; it ultimately tipped that balance in favor of the former. *Id.* at 1081, 1092-1093. For an extended analysis of the case, see also Will Dawson, Note, *Highway U.S. 70 and the Hondo Valley – Safety and Cost vs. History*, 13 SE. ENVTL. L.J. 97 (2004).

or to instead allow it to deteriorate or be demolished, likewise often turn on matters of sheer practicality.<sup>110</sup> Even though a property may be preserved, such “protected” status fails to provide absolute safeguards, particularly if a given project is lacking governmental support, and especially that of the host community. Consider the treatment of three downtown historic theaters by their respective southern New Jersey communities.

The 1937 Landis Theater, the last Art-Deco-styled theater in the state, has remained closed in the middle of Vineland’s commercial district since 1987 and it continues to fall into ever-greater states of disrepair despite several years worth of attempts to initiate a restoration.<sup>111</sup> A group of local residents managed to secure a \$455,000 preservation grant at one point but had to forfeit the money when they failed to raise the required fifteen percent of the matching funds, despite its

---

<sup>110</sup> See *supra* note 22, *infra* note 137. One southern New Jersey city is actually looking to decrease the size of its historic district, which also happens to be the largest historic district in the state. The city of Bridgeton, Cumberland County, is a small Victorian city, most of whose original turn-of-the-century buildings and houses still stand. The entire 6.5 square-miles within its borders have been designated historic. But the continuing problems of crime and poverty that have plagued the city for the past two decades have led city leaders to, with the past year, lobby strongly for a proposal that would substantially reduce the district’s boundary to make way for new development that would foreseeably increase tax revenues but consequently cause the destruction of many of the city’s historic properties.

<sup>111</sup> See Brian Uzdevinis, *Theater Restorers Hope for Happy Ending: Similar Historic Preservation Projects in the Neighboring Cities of Vineland and Millville are having Different Degrees of Success*, THE PRESS OF ATLANTIC CITY, October 27, 2002, at C1. The head of the Landis Theater Redevelopment Association purchased the property for about \$100 in 1996. The 10-member association, a group of local residents, then offered guided tours, hosted community events and sold commemorative memorabilia, but managed only to raise about \$10,000 during the next several years. The group estimated it would require about \$3.8 million to restore the 1,000-seat theater, a figure that includes a \$100,000 bill in back taxes that the city refuses to forgive. Still, the group was forced to forfeit a \$455,000 state historic preservation grant because it could not raise 15-percent of the required matching funds. The site is listed on both the state and the national Register of Historic Places, and it sits on a corner at the center of the city’s commercial district within the jurisdiction of three major local economic development entities, a downtown improvement district, an urban enterprise zone and an empowerment zone. See also <http://www.vineland.org/history/landistheater/>; <http://cinematreasures.org/theater/301/>.

location within the jurisdiction of three major economic development entities, and despite its presence on both the state and the national Register of Historic Places since 2000 and 2001, respectively.<sup>112</sup> Critics blame the city, which considers the property, but not the theater, valuable because of its central location among the more contemporary styled downtown's businesses.<sup>113</sup> In early 2006, the city council authorized the expenditure of \$70,000 on a structural and environmental analysis of the theater. Yet, given the city's explicit reservation of the right to demolish the structure if the studies show it is beyond repair or too costly to fix, the analyses appear likely motivated by more of a desire to finally erase an eyesore rather than an interest in preserving this piece of the past.<sup>114</sup>

Ten miles away in downtown Millville, another Cumberland County city, the historic Levoy Theater nears the end of its multi-million-dollar rehabilitation into a regional performing arts center.<sup>115</sup> Local officials, who consider it the focal point of the city's newly revived arts district, admit the theater will never be a great money-maker, but they nonetheless consider the fact that it will be an "attraction" important enough.<sup>116</sup>

---

<sup>112</sup> Uzdavinis, *supra* note 111.

<sup>113</sup> *Id.*

<sup>114</sup> Tom Namako, *Vineland Authorizes Landis Theater Studies*, THE PRESS OF ATLANTIC CITY, February 15, 2006, at C1, available at <http://www.pressofatlanticcity.com/news/story/5912422p-5926612c.html> ("City Council President John Barretta said he'd like to see the theater remain, but if that's not economically possible, other redevelopment options will be explored.").

<sup>115</sup> See Uzdavinis, *supra* note 111; see also The Levoy Theatre, Center for the Performing Arts, <http://www.levoy.org/> (last visited May 9, 2007).

<sup>116</sup> *Id.* The Levoy Theater Preservation Society, which claims 100 contributing members, an eight-member board, an accountant and an attorney, was formed in 1995 and has since raised about \$80,000 toward restoring theater, which closed in 1974. The rehabilitation is estimated to cost approximately \$6 million, but the society has received considerable financial support from the city and the surrounding community. Through fundraising efforts organized by the county college and the city's Development Corporation, the society managed to have matching funds ready before it even applied for the several historic preservation grants it ultimately received from the state.

Similarly, despite multiple lost deals, the City of Woodbury, Gloucester County, continues to market its historic theater to developers for renovation into a regional performing arts center of its own.<sup>117</sup> The theater, an immense red-brick Victorian building erected around 1880 by the city's, and possibly the country's, first multi-millionaire, George G. Green, virtually spans a city block and presently stands empty at the heart of the city's downtown business district.<sup>118</sup> But redevelopment authorities for the city and county governments have secured various grant and funding options for potential investors.<sup>119</sup> A recent deal remains in the works, depending in large part on acquisition of additional nearby properties for parking.<sup>120</sup>

## V. NEW JERSEY'S MANY HINDRANCES TO PRESERVATION EFFORTS

Despite the many studies attesting to the numerous benefits of historic preservation, particularly from a financial perspective,<sup>121</sup> flawed policies and misguided approaches

---

<sup>117</sup> See Brian Uzdavinis, *Diamond in the Rough: Opera house may be Restored*, GLOUCESTER COUNTY TIMES, February 6, 2001; see also Pete McCarthy, *Woodbury's Revitalization Plan finds Bumps along the Way*, GLOUCESTER COUNTY TIMES, November 21, 2005, at A1.

<sup>118</sup> See Uzdavinis, *supra* note 117. Green's Opera House once hosted performances by Mary Pickford, and by Rear Adm. Richard E. Byrd who, in 1931, offered a talk there on his historic flight to the South Pole. Its owners started using it to show films around 1950, when it actually became the region's first air-conditioned movie theater – and one of the largest, with 1,100 seats, including 465 in the balcony. It closed later that decade. *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> See Pete McCarthy, *City Hopeful on Downtown Sites*, GLOUCESTER COUNTY TIMES, February 24, 2006.

<sup>121</sup> See, e.g., NEW JERSEY HISTORIC TRUST, PARTNERS IN PROSPERITY: THE ECONOMIC BENEFITS OF HISTORIC PRESERVATION IN NEW JERSEY, (1998), [http://www.state.nj.us/dca/njht/publ/ec\\_imp.pdf](http://www.state.nj.us/dca/njht/publ/ec_imp.pdf). This report, originally published by Rutgers University in 1997, provides numerous statistics showing the practical and positive impact that historic preservation has on state and regional economies. In New Jersey, an estimated \$123 million in annual statewide historic rehabilitation (1994 base year) are translated by the study's input-output model into multiplier effects on the state's economy. That model



nonetheless threaten the state's vast historic resources, and problematic loopholes in state laws remain unaddressed.

#### A. MISGUIDED PLANNING

In a state like New Jersey, the ever-increasing number of its residents, the incredible density of its population, and the steady demand for new commercial and residential development, all combine to tip the scales in favor of decisions driven by short-term practicality and immediate financial returns.<sup>122</sup> In many cases, if it is cheaper now, it simply is considered better.

Despite the numerous policy arguments in favor of "smart growth" and the reuse and redevelopment of existing resources and infrastructure,<sup>123</sup> the trend has continued in New Jersey during the past 50 years toward the least beneficial and most inefficient and consumptive use of land.<sup>124</sup> What was traditionally a state of communities of two types, either "compact urban density" or "open rural density," has become subsumed by a "race for the middle" of the density scale as illustrated by the continuing proliferation of spread-out development across the state's midsection and otherwise undeveloped sectors.<sup>125</sup>

The retention of New Jersey's internal diversity, and specifically our ability to replicate in new development the characteristics of our existing higher-density communities, are key to controlling sprawl and protecting our remaining open and rural lands. Density conserves land and saves money and, if properly designed, it can also save time. New Jersey needs to reacquaint itself with

---

shows that, on an annual basis through preservation efforts within the state (among other results), more than 2,300 new jobs are created, \$81 million in income is generated, and more than \$15 million in state and local taxes are collected. *Id.*

<sup>122</sup> See Evans, *supra* note 7; see also *supra* note 8.

<sup>123</sup> See, e.g., Hersh, *supra* note 3.

<sup>124</sup> Evans, *supra* note 7, at 1-2.

<sup>125</sup> *Id.*



the advantages that density has brought us, so that we do not continue down our present path toward a future characterized by an undifferentiated landscape of sprawling subdivisions, ever-increasing property taxes, and chronic, ubiquitous traffic.<sup>126</sup>

Essentially, more compact populations means more sharing of roads, sewers and other public services like schools, while more sprawling development means, among other things, more extensions of such services into more outer-lying areas, greater automobile dependence, extended commutes and traffic congestion.<sup>127</sup> The problem, according to one land-use study by the smart growth research and policy group New Jersey Future, stems from a combination of many bad decisions made by individual municipalities, each one acting in its own self-interest.<sup>128</sup> By continuing to permit such low-density development, for example, a given town achieves the most tax dollars in exchange for the least amount of services; fewer and larger and more expensive houses spread over more land mean more tax revenues, but fewer new children in the schools and a more minimal drain on municipal services in general.<sup>129</sup>

It perhaps makes sense, from a local government perspective (if one wants to maintain the appearance of fiscal conservative practices and remain in office), to seek the cheapest, short-term solutions in a state where voters pay the highest property taxes in the country.<sup>130</sup> Were the same approach transferred to historic preservation policies, again despite numerous studies

---

<sup>126</sup> *Id.* at 4.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> The average property tax bill, calculated per capita, in New Jersey for the year 2002 was \$1,872. It is the highest in the country, compared to second, third and fourth highest in Connecticut, New Hampshire and Maine of \$1,733, \$1,703 and \$1,477, respectively. Compare this to lows of \$329, \$371 and \$408 in Alaska, Arkansas and New Mexico. THE TAX FOUNDATION, STATE AND LOCAL PROPERTY TAX COLLECTIONS PER CAPITA BY STATE (2002), <http://www.taxfoundation.org/taxdata/show/251.html>.

attesting to the benefits of preservation financially, socially and culturally, the result would prove devastating.<sup>131</sup> Yet, when it comes to preservation, not only are the state's general demographic situation and its locally based short-term fiscal outlooks combined on the scale against the effort, so too are certain laws and policies that, at least superficially, assume the ally's guise.<sup>132</sup>

## B. NEW JERSEY REDEVELOPMENT LAW: THE CONSEQUENCES OF SMART GROWTH

Enacted in 1992, the New Jersey Local Redevelopment and Housing Law encourages growth through redevelopment within existing towns and municipalities based on the premise that a community grows smarter by not growing outward.<sup>133</sup> It basically seeks to avoid the need to build ever more infrastructure while expending, if not simply misusing, more and more open space and natural resources.<sup>134</sup> The law enables a given municipality with distressed areas to create a redevelopment plan, which must be fairly comprehensive and

---

<sup>131</sup> See, e.g., PARTNERS IN PROSPERITY, *supra* note 121.

<sup>132</sup> It is perhaps no surprise, then, that most New Jersey communities, in forming historic preservation commissions, are more inclined to adopt ordinances that cast their respective commissions in mere advisory, rather than more regulatory, roles. The commission can thus remain an independent voice regarding local preservation interests, but a voice much more easily silenced or cast aside by upper-level local governing bodies that are in no way required to pay them any deference. See Enrich, *infra* note 137; see also STATE OF NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, DIVISION OF PARKS AND FORESTRY, HISTORIC PRESERVATION OFFICE, NEW JERSEYS CERTIFIED LOCAL GOVERNMENT, [http://www.state.nj.us/dep/hpo/3preserve/clg\\_links.htm](http://www.state.nj.us/dep/hpo/3preserve/clg_links.htm).

<sup>133</sup> N.J. Stat. Ann. § 40A:12A-1 (West 2007); see also, *Using New Jersey's Local Redevelopment and Housing Law*, Smart Growth Solutions, Smart Growth Gateway, [http://www.smartgrowthgateway.org/local\\_redevlaw.shtml](http://www.smartgrowthgateway.org/local_redevlaw.shtml); Anne S. Babineau, *The New Local Redevelopment and Housing Law: Enhanced Redevelopment Opportunities – Not Just for Urban Municipalities*, available at <http://www.wilentz.com/wilentz/docs/articles/TheNewLocalRedevelopmentAndHousingLaw-EnhancedRedevelopmentOpportunities-NotJustForUrbanMunicipalities.pdf>.

<sup>134</sup> *Id.*

justify the need for redevelopment – essentially, it must illustrate what will disappear, what will remain, and what in general is intended for the area.<sup>135</sup> Once the plan is adopted by the local governing body, which must have, but often sits itself as, a redevelopment board, it is forwarded to the state Department of Community Affairs' Office of Smart Growth for a virtually guaranteed approval.<sup>136</sup>

The problem is, once approved and thus enabled under state law, the redevelopment plan trumps the municipality's prior zoning codes.<sup>137</sup> While the law allows for certain intervention concerning environmentally sensitive areas, local historic sites and districts lose all protections previously afforded by the earlier zoning plans and ordinances since all such protections must give way to the new redevelopment plan, which rezones all existing underlying zoning.<sup>138</sup> These loopholes presently stand without remedy and continue to result in the loss of many of the state's historic resources.<sup>139</sup>

A recent case in point is the Borough of Helmetta, Middlesex County, a community that originally emerged as a small town that grew around an old snuff mill and tobacco factory that dates to the 1870's.<sup>140</sup> The historic complex's more than one-hundred buildings, most of them vacant, still stand and have remained on the National Register of Historic Places since 1980.<sup>141</sup> A few

---

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> Telephone Interview with Ron Emrich, Executive Director of Preservation New Jersey, a nonprofit historic preservation advocacy group ([www.preservationnj.org](http://www.preservationnj.org)) October 2005.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> Jeff Linkous, *New Jersey: Town Built around Now-defunct Tobacco Factory*, THE PHILADELPHIA INQUIRER, November 13, 2002, <http://www.phillyburbs.com/pb-dyn/news/172-11132002-138.html> ; see also *Helmetta: From Snuff to Snuffed Out*, Jamesburg Network, at <http://jamesburg.net/snuffedout01.html>; NEW JERSEY, MIDDLESEX COUNTY, HISTORIC DISTRICTS, NATIONAL REGISTER OF HISTORIC PLACES, <http://www.nationalregisterofhistoricplaces.com/NJ/Middlesex/districts.html>.

<sup>141</sup> Linkous, *supra* note 140.

years ago the borough council determined the entire vicinity was an area in need of redevelopment under the state's Local Redevelopment and Housing Law, so it derived its plan and sent it to the state, which offered approval,<sup>142</sup> essentially because the state has little authority to intervene under the Redevelopment Law.<sup>143</sup> Now, most of the historic factory's buildings will be demolished to make way for a new residential complex of apartments and condominiums.<sup>144</sup>

### C. THE MLUL AND THE PROBLEM OF ANTICIPATORY DEMOLITION

Municipal land-use laws in general are the means through which a given state's legislature authorizes local governing bodies within that state to enact zoning and planning ordinances.<sup>145</sup> These laws mostly resemble one another from state to state. Unlike those of most other states, however, New Jersey's Municipal Land-Use Law,<sup>146</sup> requires communities to follow existing zoning laws until the moment they are officially changed, and pending changes to those laws, such as, if a given town is enacting historic preservation ordinances, will not be honored until the exact date the changes take effect.<sup>147</sup>

So, even if a local governing body has amendments ready to add to its municipal zoning laws that, for example, would declare a particular building historically preserved, developers need not abide by those amendments until the date they officially take effect. In essence, those developers nonetheless can move forward with their plans, purchase and destroy a given property, so long as they do so before the amendment becomes official. Many states recognize this deficiency, on the other

---

<sup>142</sup> *Id.*

<sup>143</sup> Emrich, *supra* note 137.

<sup>144</sup> *Id.*

<sup>145</sup> See *supra* notes 121, 132, & 133.

<sup>146</sup> N.J. STAT. ANN. § 40:55D (West 2007).

<sup>147</sup> Emrich, *supra* note 137.

hand, and now require that if a certain preservation-related zoning action or historic designation is pending, then the new rules will apply as though the pertinent site or district already is designated and protected.<sup>148</sup>

Consider, for example, the case of the Marlboro Inn in Montclair, Essex County.<sup>149</sup> During the past year, the eighteenth-century Tudor-style inn, a significant historic site there, was demolished despite all attempts by the Montclair Historic Preservation Commission to designate the property as a historic landmark, a status that otherwise likely would have precluded the demolition.<sup>150</sup> The property's owner plans to develop the site with a handful of new houses.<sup>151</sup>

## VI. CONCLUSION AND RECOMMENDATIONS

Historic preservation districts protect historically significant properties and neighborhoods located within their confines through guidelines and regulations set forth for the most part through local planning and zoning ordinances. This is not so easy for a number of reasons. Criticism persists, considering the issues that stem from the property rights movement, gentrification and displacement. Additionally, in a state like New Jersey, given the incredible density of its population, its ever-increasing number of residents, and the steady demand for

---

<sup>148</sup> *Id.*

<sup>149</sup> Paul Brubaker, *The Inn may be History: Council Rejects Historic Landmark Ordinance*, THE MONTCLAIR TIMES, July 14, 2004, <http://www.montclairtimes.com/page.php?page=7919>; see also, National Trust Legal Defense Fund Update, May 2005, <http://www.nationaltrust.org/law/LDF.Update.May.2005.pdf>; Marlboro Inn Preservation Ass'n v. Township Council of Montclair, No. ESX-L-8516-04 (Essex Cty. N.J. Super. Ct. Dec. 6, 2004).

<sup>150</sup> Brubaker, *supra* note 149; see also Hoboken Environment Committee Inc. v. German Seaman's Mission, 391 A.2d 577 (N.J. Super. Ct. Ch. Div. 1978). The notion of anticipatory demolition is nothing new. In this case, a local historic committee challenged the proposed demolition of a historic site based on the pending possible governmental declaration of the site as historically preserved. The court held that, since permits already had been issued and the district had not yet been declared historic, the demolition could proceed. *Id.*

<sup>151</sup> *Id.*

new commercial and residential development, it becomes difficult to consider the efforts of such preservation programs as little more than a cracked and groaning levy futilely attempting to fend off the inevitable tide of strip malls, pre-fabricated developments, condominiums and suburban sprawl.

Historic districts and preservation programs, to most state and local governments, afford numerous benefits, a means of conserving natural resources, curbing sprawl, generating heritage tourism, increasing property values, reusing existing resources and revitalizing aging, run-down neighborhoods. They also help maintain a given community's individual character, establishing a sense of orientation for people through preserving distinguishing landmarks and civic features while resisting the growing wave of corporate-driven suburban conformity. But when growth and practicality become the overwhelming trend, what place do such efforts have and what purpose, if any, do they serve at all aside from that of the whining elderly nag perpetually lamenting the loss of the bygone era?

If historic preservation is to have a future in New Jersey, communities must become more willing to assume proactive roles and local governing bodies must become more willing to empower their historic preservation commissions with regulatory powers and not just cast them as simple advisory panels completely subordinated to the local planning and zoning boards, whose interests often diverge from those of the preservationist. Loopholes in state preservation and redevelopment laws must be closed. New Jersey's Local Redevelopment and Housing Law must be amended to account for pre-existing historic preservation districts and properties, and new redevelopment zoning that becomes approved under the law must be subject to, or at the very least informed by, the preservation-based elements of the former zoning. Finally, the state's Municipal Land Use Law must be amended to account for pending and forthcoming historic designation and zoning so as to thwart the threat of anticipatory demolition.